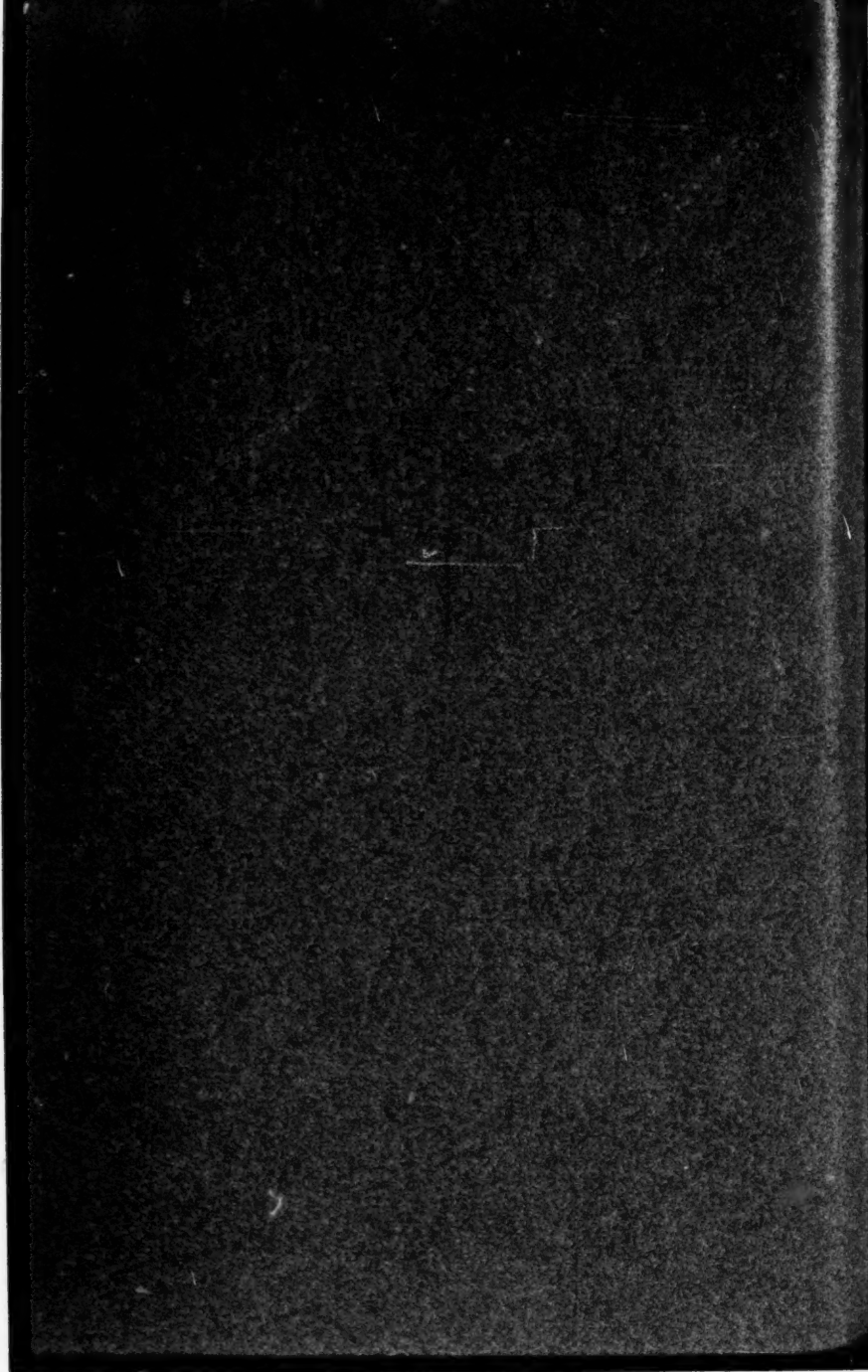


THE NATIONAL ARCHIVES
COLLECTION OF
FEDERAL BUREAU OF INVESTIGATION
- 1 -

THE NATIONAL ARCHIVES

SERIAL FROM BUREAU OF INVESTIGATION
THE NATIONAL ARCHIVES

(15,795)



(16,795.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 242.

KENT K. HAYDEN, AS RECEIVER OF THE CAPITAL
NATIONAL BANK OF LINCOLN, NEBRASKA, APPEL-
LANT,

vs.

THE CHEMICAL NATIONAL BANK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

KENT K. HAYDEN, as Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant, Appellant,	}
vs.	
THE CHEMICAL NATIONAL BANK, Defendant, Appellee.	}

Transcript of Record.

Appeal from the circuit court of the United States for the southern district of New York.

[Stamped:] United States circuit court of appeals, second circuit.
Filed Jul- 2, 1898. William Parkin, clerk.

1 In the Circuit Court of the United States for the Southern District of New York.

KENT K. HAYDEN, as Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,	}	In Equity.
against		
CHEMICAL NATIONAL BANK, Defendant.	}	

To the judges of the circuit — of the United States for the southern district of New York:

Kent K. Hayden, as receiver of the Capital National Bank of Lincoln, Nebraska, brings this his bill against The Chemical National Bank, the defendant, and hereby your orator, for an amended bill, complains and alleges:

1. That the Capital National Bank of Lincoln, Nebraska, is and ever since the second day of June, 1884, has been a banking association organized and existing under and by virtue of the laws of the United States, and located at Lincoln, in the State of Nebraska, which said bank from about the second day of June, 1884, until on or about the twenty-first day of January, 1893, was engaged in the business of banking at the place last aforesaid, under the laws of the United States. That on the last-named date the said bank was insolvent, failed and stopped doing business, and has paid none of its obligations since that date, and that on the twenty-second day of January, 1893, the Comptroller of the Currency of the United States became and was satisfied of the insolvency of said bank, closed said bank and took possession of all its assets and affairs. That thereupon, on or about the sixth day of February, 1893, after due examination of the affairs of said bank, the said Comptroller of the Currency appointed and duly commissioned John D. MacFarland, receiver of the said association. That said MacFarland qualified as such receiver, and entered upon the duties of said office and proceeded to close up said association. That on or about the fourth day of May, 1893, the said MacFarland resigned

his office of receiver of said association, which resignation was duly accepted by the said comptroller, and on or about the eighth day of May, 1893, your orator, by the name and designation of K. K. Hayden, was by the said Comptroller of the Currency of the United States, duly appointed receiver of the said association to succeed the said MacFarland; that on or about the thirty first day of May, 1893, your orator duly qualified as such receiver, entered upon the duties of said office, took possession of said bank, its books, records, assets and effects, proceeded to close up said bank, is now engaged in closing and winding up the affairs of said bank, and that this suit is brought and bill filed for the purpose of closing and winding up the affairs of said bank, and collecting its assets and effects, converting them into money and distributing it amongst the depositors and

3 other creditors of said bank *pro rata*, to their several and respective just claims and demands.

II. Your orator further shows unto your honors that for a period long prior to the fifteenth of January, 1893, and at all times since, said banking association was insolvent, and that on the fifteenth of January, 1893, and at all times since, its insolvency was known to all its officers, and it was entirely apparent to all of its officers that the said banking association would presently be unable to meet its obligations, and would be obliged to suspend its ordinary operations.

III. Your orator further shows unto your honors that for many years prior to the second day of June, 1884, and at all times since, the defendant has been a banking association, organized and existing under and by virtue of the laws of the United States, and located at New York and engaged in the business of banking there under the laws of the United States.

IV. Your orator further shows unto your honors that ever since the second day of June, 1884, there have been mutual and extensive dealings between the two banking associations hereinabove named, in which each had acted for the other, as correspondent banks do, for the making of collections and the crediting of the proceeds thereof and transmitting accounts of the same, including costs of protest and other expenses, and the first-named bank also kept an active deposit account with defendant, and that settlements on the basis of such accounts were made at periodic times during all said period, and any balance after the correction of errors, mutually agreed to be charged or credited, was at such periods

4 credited or debited, as the fact might be, upon the books of each of said banks to a new account, and the prior accounts thereby and in that manner adjusted and settled.

V. Your orator further shows unto your honors that the defendant refused payment upon all such drafts made upon it by the first-named bank, as were presented to the defendant on the twenty-first day of January, 1893, and at all times subsequent, and the same were thereby dishonored and returned wholly unpaid.

VI. Your orator further shows unto your honors that since the twenty-second day of January, 1893, the defendant has received many and large sums of money belonging to and for the account

of the first-named banking association, some of it being the sums of \$2,935.60, \$815.79, and \$735, from the officers of the first named banking association, and the rest from the third parties which remitted the same to the defendant for account of the first-named banking association, and that in particular it received on the twenty-third of January, 1893, five thousand dollars from Parker's national bank, and two thousand dollars from the Shuster Hax national bank, and divers other sums from others, on that day and since, all for the account of the first-named banking association, all of which defendant still retains.

VII. And your orator further shows unto your honors that the said defendant, disregarding the obligation it is under to your orator to render and account to your orator of its acts and doings concerning the collection of the monies so received after the closing of the first-named banking association as aforesaid, refuses to account to your orator and pay over to him the said collections.

5 All of which being contrary to equity and good conscience, and tending to the manifest wrong and injury of your orator, that the defendant may, if it can, show cause why your orator should not have the relief hereby prayed for and may full, true and perfect answer make (oath being waived), to all and singular the matters and charges aforesaid. And that an accounting may be had in respect to the matters and things herein mentioned and the amount due to your orator over and above all reasonable and just charges and expenses be ascertained and a decree be entered adjudging the sum so found to be due to be paid to your orator, and that your orator may have such further order or relief as may be just.

May it please your honors to grant to your orator the writ of subpoena of the United States of America, issuing out of and under the seal of this honorable court, directed to the defendant, thereby commanding it at a certain day and under a certain penalty therein to be expressed, to appear before your honors in this honorable court, then and there to answer the premises, and to attend and abide by such order and decree therein, as to your honors shall seem meet and as shall be agreeable to equity and good conscience.

EDWARD WINSLOW PAIGE,

Solicitor for the Complainant, 44 Cedar Street, N. Y. City.

EDWARD WINSLOW PAIGE, *Of Counsel.*

6 In the Circuit Court of the United States for the Southern District of New York.

KENT K. HAYDEN, as Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,	} In Equity.
<i>against</i>	
CHEMICAL NATIONAL BANK, Defendant.	

The answer of the Chemical National Bank to the amended bill of complaint of Kent K. Hayden, as receiver of the Capital National Bank of Lincoln, Nebraska.

This defendant, now and at all times hereafter, saving to itself all and all manner of benefit or advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections, in the said amended bill contained, and protesting that said complainant has not, in said amended bill, made or stated such a cause as doth entitle him to any such discovery or relief as is thereby sought and prayed for, from or against this defendant, for answer thereto, or so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says :

I. This defendant admits the organization of the said Capital National Bank of Lincoln, Nebraska, and the organization
 7 of this defendant, as banking associations, under the laws of the United States; that there were mutual and extensive dealings, correspondence, and statements of accounts between said Capital national bank and this defendant; that the said John D. MacFarland was made and appointed receiver of said Capital national bank on or about the sixth day of February, 1893, and that, upon his resignation of such receivership, the plaintiff, Kent K. Hayden, by the name and designation of K. K. Hayden, was made and appointed receiver of said Capital national bank on or about the 8th day of May, 1893.

II. This defendant does not know and cannot set forth, as to its belief or otherwise, whether or not it is as alleged or is the fact that said Capital bank was insolvent, failed, and stopped doing business on the 21st day of January, 1893, or that it has paid none of its obligations since then, or that on the 22d day of January, 1893, the comptroller became and was satisfied of the insolvency of said bank, or that for a period long prior to the 15th day of January, 1893, and at all times since then the said Capital national bank was insolvent, or that on the 15th day of January, 1893, and at all times since, its insolvency was well known to all its officers, or that it was apparent to all its officers that the said bank would presently be unable to meet its obligations, and would be obliged to suspend its ordinary operations; but this defendant avers that up to the 23d day of January, 1893, it was informed and did believe that the said Capital national bank was entirely solvent, and dealt with it and gave it credit as a solvent bank.

III. This defendant denies that on and after the 21st day of Jan-

8 uary, 1893, it ceased to pay and refused to pay, all drafts drawn upon it by the said Capital national bank, but admits that on the 23d day of January, 1893, because of information then for the first time received of the struggling condition of said bank, this defendant did on and after the 23d day of January, 1893, refuse to pay the drafts of said Capital national bank, which was then indebted to this defendant in a large sum, to wit, at least the sum \$13,992.93, on balance of account, besides large amounts of negotiable paper, endorsed by said Capital national bank, then held by this defendant, and previously purchased from or discounted for it by this defendant, and the proceeds of which had by it been credited to said Capital national bank on its said account, all which transactions were had and made in the usual and accustomed course of business between said Capital national bank and this defendant, and without any knowledge, notice, or belief on the part of this defendant that said Capital national bank was insolvent or in any danger of becoming insolvent or suspending its usual business as a banking association.

IV. This defendant denies that it has, since the 22d day of January, 1893, received many and large sums of money belonging to and for account of said Capital national bank, some of it from the officers of said bank, and the rest from third parties. This defendant admits that since 21st day of January, 1893, it has received certain remittances and payments in the form of checks or drafts, for account of said Capital national bank, all which it placed to the credit of said Capital national bank, on its account with this defendant, which left the said Capital national bank indebted to this defendant in a large sum, in the form of balance of account and negotiable paper endorsed to this defendant by said Capital
9 national bank; and on information and belief this defendant alleges: That said remittances and payments were made by the said Capital national bank, or by other banks and bankers, by the direction and order of said Capital national bank through the United States mails, and were so ordered, made and remitted before the appointment of any receiver for said Capital national bank, and before it ceased to pay its obligations or had suspended its usual and ordinary banking business. And said remittances by the said Capital national bank, or by other banks and bankers, by it ordered to be made to this defendant, were made in the ordinary and accustomed course of business between this defendant and the said Capital national bank, and when received by this defendant, were by it placed to the credit of said Capital national bank, and this defendant is advised, and on information and belief alleges, that it had and acquired a good and perfect right and title to said sums so remitted to and received by it.

And answering the allegations of said amended bill of complaint touching the said several particular sums of money therein averred to have been received by this defendant for and on account of said Capital national bank, this defendant avers:

That it received the said sums of \$2,935.60, \$815 79, \$735.00, \$5,000.00, and \$2,000.00 on the 23d day of January, 1893. That the

said sums of \$2,935.60 and \$815.79 were remitted to this defendant on or about the 19th day of January, 1893, and the said sum of \$735.00 on or about the 20th day of January, 1893, by the said Capital national bank, which, on said respective days, deposited and delivered the same in the United States mail, in letters addressed to this defendant, in the usual and accustomed course of business, and before the

10 said Capital national bank suspended payment or stopped business, and before it was taken charge of by the said MacFarland as receiver, under the direction of said comptroller.

That the said sum of \$5,000.00 was remitted to this defendant on or about the 19th day of January, 1893, by Parker's national bank and the said sum of \$2,000.00 was remitted to this defendant by the Schuster Hax national bank on or about the 19th day of January, 1893, by being by said banks respectively deposited in the United States mail, in letters addressed to this defendant, in the usual and accustomed course of business, and before said Capital national bank suspended payment or stopped business and before it was taken charge of by said MacFarland as receiver, under the directions of the said comptroller. And on information and belief, this defendant alleges that said remittances to it, by Parker's national bank and the Schuster Hax national bank, respectively, were made in virtue and pursuance of orders and directions previously given by said Capital national bank to said Parker's national bank and the Schuster Hax national bank, respectively, to wit, on or about the 18th day of January, 1893, in the usual and accustomed course of business between them and the said Capital national bank, before it stopped payment or suspended business, and before it was taken charge of by said receiver under the directions of said comptroller. And at all times when said sums were remitted as aforesaid, this defendant was dealing with and giving credit to the said Capital national bank as a bank in good credit, condition, and repute, and without any notice, knowledge, or reason to believe that it was insolvent or in a struggling condition, or in any danger of stopping business or suspending payment. And this defendant is advised, and on information

11 and belief alleges, that it properly placed all of said sums and other remittances to the credit of the said Capital national bank, in part payment of the larger sum it was then owing this defendant, and that this defendant had, and still has, a lien upon all of said sums and remittances by reason of the indebtedness of said Capital national bank to this defendant, and that its just claim and demand against said Capital national bank on balance of account is at least the sum of \$13,290.94, with interest thereon, besides its claim on said negotiable paper.

V. This defendant denies that it has refused or does refuse to render to the complainant a full, true and distinct account of its dealings with said Capital national bank, and avers that it has rendered such accounts to the said bank, and to the complainant as receiver of said bank, which accounts were full, true and distinct, and showed the balance due by said bank to this defendant. And this defendant denies that it is indebted to the complainant in a large

amount, or in any amount, and denies that there is any balance due him from this defendant.

And this defendant denies all and all manner of unlawful acts and dealings wherewith it is by the said bill charged, without this, that there is any other matter or thing in the said plaintiff's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and fully well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant, all which things this defendant is ready to maintain and prove as this honorable court shall direct, and humbly prays that it be hence dismissed, with its reasonable costs and expenses in this behalf most wrongfully sustained. And should this honorable court order any account as prayed for

by the plaintiff, this defendant prays that the said plaintiff,
12 as receiver, be ordered, adjudged and decreed to pay this defendant the sum due to it from the said Capital National Bank of Lincoln, Nebraska, and for such other and further relief as may be just and equitable.

GEO. C. KOBBE,

Sol'r for Defendant, 44 Wall Street, N. Y. City.

GEO. H. YEAMAN, *Of Counsel.*

THE CHEMICAL NAT. BK. OF N. Y.,

[SEAL.]

By WM. J. QUINLAN, JR., *Cashier.*

STATE OF NEW YORK, }
City and County of New York, } ss:

On this 31st day of January, 1896, before me personally appeared William J. Quinlan, Jr., who made solemn oath that he now is, and at all times mentioned in the bill of complaint and in the foregoing answer was, the cashier of the defendant Chemical National Bank of New York; that he has read the foregoing answer subscribed by him; that he knows the contents thereof, and is familiar with the matters and things therein alleged, and the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

WM. J. QUINLAN, JR.

Sworn to and subscribed before me this 31st day of January, 1896

EDW'D P. BROWN,

[SEAL.]

Notary Public, Kings Co.

Cert. filed in N. Y. Co.

13 Circuit Court of the United States, Southern District of New York.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,	}
<i>against</i>	
CHEMICAL NATIONAL BANK, Defendant.	

The Replication of the Above-named Complainant to the Amended Answer of Defendant.

This repliant, saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said amended answer, for replication thereunto says: That he will ever maintain and prove his amended bill of complaint to be true, certain and sufficient in law to be answered unto; and that the said amended answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said amended answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and maintain and

14 prove, as this honorable court shall direct, and humbly prays, as in and by his said amended bill he has already prayed.

Dated February 5th, 1896.

EDWARD WINSLOW PAIGE,
Solicitor for Complainant.

To George C. Kobbe, solicitor for defendant.

Circuit Court of the United States, Southern District of New York.

KENT K. HAYDEN, as Receiver of the Capital National Bank of Lincoln, Nebraska,	}	In Equity.
<i>against</i>		
CHEMICAL NATIONAL BANK.		

Proofs Taken before John Shields, Esq., Examiner, in New York, on the Fifth Day of September, 1896.

For the purpose of the hearing and determination of this cause, it is agreed and stipulated:

I. The complainant may read as part of his proofs the proofs as printed and filed in the case of Kent K. Hayden, as receiver, against George G. Williams and John B. Dodd, in this court, with the same effect as if the witnesses were produced and examined, and gave the same testimony and produced the exhibits there given, but subject

15 to all legal objections taken when said witnesses were examined, and any additional objections that may be interposed at the hearing, except the objection that the books and papers of the bank were not in evidence, which is waived; and the admissibility of the proofs to be the same as if the books and papers of the Capital National Bank of Lincoln, referred to in the testimony of the witness Hayden, were already in evidence. Subject to the exceptions stated, all objections may be taken at the hearing without previous motion or order to settle or suppress.

II. For the purpose of this trial only it is admitted that the said Capital national bank continued to transact the usual and ordinary business of a national bank up to the close of banking hours on January 21st, 1893.

III. That the ordinary and usual mail time between Lincoln, Nebraska, and the city of New York is 50 hours and 35 minutes. And between Lincoln and South Omaha, Nebraska, where Packers' national bank is located, is 2 hours and 40 minutes. And between said South Omaha and New York city is 48 hours and 37 minutes. And between Lincoln and St. Joseph, Mo., where the Schuster-Hax national bank is located, is 7 hours and 28 minutes. And between said St. Joseph, Mo., and New York is 50 hours and 55 minutes.

The complainant then read in evidence an account of transactions between the Capital national bank and the respondent—which the respondent had previously furnished to the complainant. It is as follows:

16

(Copy.)

Dr. Capital national bank, Lincoln, Nebraska, in account with
Chemical national bank. Cr.

Jan. 3, 1893. Balance.....		\$49,388 51
150,215.....	\$22 05	
160.....	13	
324.....	1,000	
261.....	336	
316.....	3,500	
		<hr/>
		4,871 05
3. Cash.....		99 46
150,049.....	1	
98.....	14 01	
78.....	15	
80.....	5	
79.....	5	
178.....	50	
257.....	178 39	
27.....	5	
49.....	39 78	
59.....	22	
39.....	16 49	
99.....	297	

KENT K. HAYDEN, RECEIVER, ETC., VS.

	63.....	98 07	
	53.....	109 33	
	40.....	66	
	29.....	11 65	
	42.....	76 18	
	48.....	33	
	70.....	28 05	
	85.....	84	
	47.....	47 75	
	3.....	6 80	
	13.....	18 99	
	65.....	11 13	
	55.....	147 79	
	24.....	325 55	
	05.....	48 13	
	00.....	93 10	
	51.....	1,480	
	50.....	100	
	315.....	45 32	
	20.....	87 50	
		<hr/>	
	177.....		3,567 73
	Tele. Jan. 3 / 92.....		21
4.	Hathran.....	2,028	2,000
	Turner.....	1,000	
		<hr/>	
17	150,091.....	5	3,028
	147.....	52 50	
	278.....	1 90	
	54.....	61 50	
	95.....	9 03	
	46.....	1 50	
	25.....	82 12	
	62.....	10	
	82.....	100	
	56.....	153 95	
	318.....	72 30	
	14.....	74 90	
		<hr/>	
	286.....		624 70
	Coupons.....		8 75
5.	Country.....		30
	149,807.....	33 37	450
	150,146.....	25	
	266.....	18 36	
	0.....	5	
	80.....	94 55	
	97.....	49 06	
	71.....	100	
	93.....	14 55	
	74.....	349 20	

THE CHEMICAL NATIONAL BANK.

11

79.....	197 57
306.....	15 52
17.....	280
150,305.....	46 30
26.....	7 50
42.....	2,000
56.....	3,000
13.....	9 60
00.....	109 53

6,355 11

43.....	2,500
258.....	7 10
025.....	15

2,522 10
350

6. Wakley.....

150,142..... 203 33

241..... 13 39

98..... 47 16

92..... 4 50

75..... 112 90

94..... 23 25

96..... 6 65

0..... 29 10

76..... 24 32

77..... 10 90

81..... 13 51

348..... 48 88

45..... 5,000

38..... 18 90

51..... 6,000

32..... 27 95

30..... 25 60

03..... 4 54

50..... 2,000

34..... 634

12..... 12 15

46..... 3,000

27..... 2 50

17,263 53
8

022.....

7. Griffin..... 1,000

Hood..... 500

1,500

149,769..... 15

150,267..... 20

9..... 26

88..... 1 12

369..... 34 90

31..... 21 75

44..... 2,700

75..... 2,000

23.....	178 02	
41.....	10 50	
33.....	49 90	
76.....	800	
71.....	120	
82.....	600	
74.....	5,000	
21.....	6	
81.....	23 50	
61.....	29 70	
84.....	1,600	
86.....	100	
99.....	147 50	
63.....	38 85	
62.....	28	
39.....	534 99	
28.....	321 36	
25.....	8 25	
53.....	153 25	
404.....	161 38	
25.....	864 17	
07.....	5,000	
	<hr/>	20,594 14
397.....	1,500	
70.....	2,000	
202.....	9 80	
347.....	24 35	
287.....	45 04	
	<hr/>	3,579 19

19 Dr. Capital national bank, Lincoln, Nebraska, in account
with Chemical national bank. Cr.

9. White.....	\$300	
Cash.....		87 50
150,092.....	5	
59.....	67 50	
50.....	1	
157.....	15	
204.....	550	
45.....	18 50	
72.....	8 50	
84.....	75 98	
377.....	50	
68.....	113 80	
96.....	258 72	
88.....	38 43	
52.....	70	
85.....	87 50	
58.....	100	
92.....	99 90	

36.....	18 38
35.....	32 32
10.....	23 30
29.....	21 10
11.....	16 10
37.....	8 65
04.....	35 28
49.....	4 25
66.....	4 90
22.....	15
79.....	75
83.....	31
78.....	75
67.....	179 86
65.....	19 05
98.....	125
422.....	2,000
38.....	2,500
18.....	46 90
03.....	66 43
06.....	1,037 50
2.....	400
28.....	280
23.....	10
00.....	15 25

364.....	28 50
421.....	5,004

8,600 10

5,032 50

189.....	1 75
372.....	5,000
54.....	462 85
91.....	65 50
80.....	50
449.....	44 10
8.....	75
46.....	300
17.....	47 75
52.....	198 90

6,171 60

345 66

766 64

10.....	
Certified 150,030.....	
150,264.....	489 72
359.....	47 65
89.....	69 25
90.....	27 77
19.....	170
441.....	14 01
16.....	73 06
11.....	10 80
45.....	163 33

	39.....	482 46	
	37... ..	307 50	
	29.....	2 50	
	20.....	200	
	150,427.....	5 50	
	12.....	1 50	
	19.....	5 91	
	36.....	45 34	
		<hr/>	
			2,116 30
	150,444.....	9,000	
	54... ..	2,000	
	387.....	5	
	442	524 30	
	179.....	400	
	465... ..	2,500	
	55... ..	30	
		<hr/>	
			14,459 30
	26.....	15	
	30.....	315	
	66... ..	1,000	
	91.....	5,000	
	77... ..	5,370 19	
	84... ..	1,000	
	62	225 80	
	14	51	
	13... ..	28 75	
	15.....	27 20	
	43.....	73 50	
	63.....	201 26	
21	35.....	46 50	
	60... ..	44 10	
	61.....	201 80	
	08.....	5	
	70.....	5	
		<hr/>	
			13,610 10
	40.....	26 90	
	83.....	500	
	394.....	55	
		<hr/>	
			581 90
	14. Altschuler.....	500	
	Wilcox	2,000	
		<hr/>	
			2,500
	148.....	5	
	357.....	49 90	
	476.....	1 75	
	3... ..	5 25	
	88.....	10 15	
	92.....	162 13	
	82.....	200	
	56.....	3	
	75.....	6 30	

THE CHEMICAL NATIONAL BANK.

15

85.....	225	
78.....	1,700	
	<hr/>	2,368 48
514.....	20	
490.....	18 65	
503.....	2,000	
	<hr/>	2,038 65
289.....	1,100	
28.....	200	
474.....	2 85	
72.....	23	
9.....	53 19	
80.....	46 50	
64.....	3 05	
87.....	2	
86.....	5	
09.....	300	
81.....	199 80	
99.....	20	
506.....	195 14	
17.....	3 15	
00.....	35	
19.....	500	
04.....	20	
11.....	29 56	
13.....	3 97	
25.....	500	
09.....	100	
	<hr/>	3,342 21
22 495.....	7,000	
534.....	1,000	
18.....	2,000	
16.....	26 27	
	<hr/>	10,026 27

DR. Chemical national bank, Lincoln, Nebraska, in account with
Chemical national bank. Cr.

Telegram		81
149,981.....	50	
150,393.....	73 40	
5.....	23 90	
08.....	25	
7.....	25	
40.....	7 50	
60.....	761 14	
498.....	36	
67.....	325	
89.....	10 90	
501.....	86 73	
5.....	150	

	2.	113 69	
	7.	110 63	
	26.	100	
	20.	15	
	24.	3,140 92	
		<hr/>	5,054 81
	39.		54 69
	211.	50	
	309.	7 40	
	401.	178 79	
	34.	62 20	
	05.	10	
	97.	69 90	
	531.	8 58	
	5.	3	
	50.	161 50	
	45.	856	
		<hr/>	1,407 37
	18. Ret'd unpaid.		36
	Thayer.		2,228 43
	70.		2,500
	10.	26 95	
	71.	1,500	
		<hr/>	1,526 95
	1 d. int. on overdraft 457,720 @ 6 %		76 28
23	19. Cash ret'd end't.		36
	150,237.	39	
	471.	1 80	
	58.	1 40	
	93.	28	
	543.	7 95	
	82.	66 90	
	80.	10	
	1.	200	
	96.	500	
	76.	5 88	
	57.	2 20	
	60.	7	
	4.	53 40	
	75.	25 67	
	67.	19 35	
		<hr/>	968 55
	47.	49 90	
	6.	7 15	
	1.	31 20	
	12.	13 20	
	37.	11	
	42.	19 21	
	58.	1 65	
	30.	20 90	

THE CHEMICAL NATIONAL BANK.

17

29.....	71 20	
40.....	42 28	
28.....	2	
53....	166	
	<hr/>	
431.....	30	435 69
572..	1	
	<hr/>	
20. Ret'd end't.....		31
		27
150,494.....	3 75	
551.....	9 95	
88.....	4 90	
08.....	22 79	
52.....	5	
150,549.....	2 50	
62.....	49 90	
48.....	56 25	
61.....	7 50	
69.....	299 70	
63.....	312 85	
68.....	289 70	
78.....	608 25	
	<hr/>	
Droste & S....	136 21	2,173 04
Fees....	1 21	
	<hr/>	
24. Ret'd prot....		137 42
		21 23
		<hr/>
		205,323 25

24

Credits.

DR. Capital nat'l bank, Lincoln, Nebraska, in account with Chemical national bank. CR.

3. 1st Negaunee.....	\$2,457 70	
Schuster-Hax.....	3,000	
" ".....	1,500	
	1,469 94	
	1,668 83	
	<hr/>	
	3,407 80	\$10,096 47
Newport S'v'gs N. H....	1,363 68	
	<hr/>	
		4,771 48
4.		1,156
5.	1,037 50	
Amer. Ex. Chic....	7,500	
	<hr/>	
		8,537 50
6.	1,190 88	
	5,333 77	
So. Omaha.....	4,500	
	<hr/>	
		11,024 65

7.	Amer. Ex. N. bk., Chicago.....	5,000
	.....	746 77
	Cont'l Boston.....	4,828 88
	1st Ht'f'd.....	4,638 75
		<hr/>
		10,214 40
9.	.....	509 10
	.....	2,378 09
	.....	465 20
	Schuster-Hax.....	1,000
	1st Negaunee.....	692 65
	Winnebago nat'l....	1,568 34
		<hr/>
		6,613 38
10.	.....	2,952 05
	Schuster-Hax.....	2,000
	U. S. Omaha	5,000
	So. Omaha....	2,000
		<hr/>
		11,952 05
12.	.....	6,368 61
	Schuster-Hax	1,000
		<hr/>
		7,368 61
13.	.....	1,150 39
	Not listed.....	36 50
	.....	1,484
		<hr/>
		2,670 89
14.	.....	2,186 57
	.....	1,380 03
	Amer. Ex. Chicago.....	5,000
		<hr/>
		8,566 60
16.	So. Omaha..	4,000 00
	.....	2,183 13
	.....	1,069 90
	1st K. C....	1,500
	" " ..	1,500
		<hr/>
		6,253.03
17.	.....	4,773 43
	.....	2,167 36
	So. Omaha.....	5,500
	Schuster-Hax.....	1,500
		<hr/>
		13,940 79
18.	Exch. Franklin.....	4,877 78
25	19. Schuster-Hax.....	1,000
	3. Discount	8,832 48
	"	1,996 33
	6. "	10,124 17
	9. "	12,388
	14. "	10,809 32
	20.	5,040 09
	.....	4,230 21
	.....	2,789 10
		<hr/>
		12,059 40

THE CHEMICAL NATIONAL BANK.

19

21.	...	2,095 98	
	...	1,377 80	
	Coldwater nat'l.....	1,958 67	
			5,432 45
23.	.....	2,935 60	
	.....	815 79	
	.....	735	
	Packer's nat'l, So. Oma.....	5,000	
	Schuster-Hax	2,000	
			11,486 39
24.	.....		833 64
	Balance Jan. 27, '93.....		13,317 94
			<hr/>
			\$205,323 75

E. & O. E.

W. J. QUINLAN, Jr., Cash.,
Per WAITE.

The complainant then read in evidence a cheque, with proof of protest, which is as follows :

Not good.
No. 150,544. CAPITAL NATIONAL BANK,
LINCOLN, NEB., Jan'y 13, 1893.
Pay to the order of M. T. Barlow, cashier, \$5,000, five thousand dollars, in current funds.
R. C. OUTCALT, Cashier.
To Chemical national bank, New York.

(Endorsed :) Pay American Exchange national bank, New York, for collection and credit of United States national bank, Omaha, Neb. M. T. Barlow, cashier.

(Endorsement erased :) Am. Exch. nat'l bk., New York. Jan. 17, 1893. Paid. Endorsement guaranteed.

26 UNITED STATES OF AMERICA, } ss :
State of New York,

To all to whom these presents shall come :

Be it known that on the 17th day of January, A. D. 1893, at the request of the holders thereof, I, William Ives Washburn, a notary public of the State of New York, duly commissioned and sworn, dwelling in the city of New York, did present the original bill of exchange, hereunto annexed, to one of the tellers of the Chemical national bank, at said bank in the said city (where the same is made payable), and did demand payment thereof, which was refused.


Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer, drawee, and endorsers of the said bill of exchange, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges, damages, and interest

already incurred and hereafter to be incurred for want of payment of the said bill of exchange.

Thus done and protested, at the city of New York afore-
[SEAL.] said, in the presence of John Doe and Richard Doe, wit-
nesses, the day and year first above written.

In testimonium veritatis.

WM. IVES WASHBURN,
Notary Public.

 Please give notice of this protest to all parties to the within bill as soon as you receive this.

The complainant then read in evidence a letter and statement of the complainant.

27 *Drafts Drawn by the Capital National Bank on the Chemical National Bank and not Paid.*

No.		Date of issue.	Date of pro- test.	Amount.
150,577	P. J. Wohlenberg.....	Jan. 16, 1893	Jan. 24, 1893	\$35 09
150,565	Thos. Evans Co.....	" 16, "	" 23, "	20 90
150,468	M. W. Sackett.....	" 9, "	" 25, "	28
150,593	Bank of New York, N. B. A...	" 17, "	" 23, "	4,995
150,616	Armour Packing Co.....	" 19, "	" 23, "	29 50
150,637	S. H. Burnham, cashier.....	" 20, "	" 23, "	2,000
150,621	S. H. Burnham, cashier.....	" 19, "	" 23, "	2,000
150,635	First nat'l bank, Whitewater..	" 20, "	" 30, "	90
150,615	First nat'l bank, Whitewater..	" 19, "	" 24, "	50
150,457	First nat'l bank, Whitewater..	" 7, "	" 26, "	54 80
150,630	German-American nat'l bank..	" 20, "	" 26, "	101 82
150,643	N. W. Gabrielsen.....	" 20, "	" 27, "	32
150,424	A. H. Knapp.....	" 6, "	" 23, "	8 40
150,521	Masonic Cem. Ass'n.....	" 12, "	" 24, "	10
150,594	Potters' nat'l bank, E. Liverpool.	" 17, "	" 23, "	385 13
150,611	W. H. McNeerney.....	" 18, "	" 24, "	30
150,644	A. W. Ocobock.....	" 20, "	" 30, "	72 59
150,652	Osgood & Thompson...	" 21, "	" 26, "	20 70
150,604	Peycke Candy Co.....	" 18, "	" 24, "	16 15
150,648	Peycke Candy Co.....	" 21, "	" 26, "	104 70
150,649	Catlin Tobacco Co.....	" 21, "	" 26, "	97 40
150,606	Frank B. Rush.....	" 18, "	" 23, "	32 90
150,527	A. Churchill & Co.....	" 12, "	" 23, "	10
150,626	First nat'l bank, Omaha.....	" 20, "	" 24, "	64 18
150,625	First nat'l bank, Omaha.....	" 20, "	" 24, "	302
150,602	L. Meyer.....	" 17, "	" 23, "	6 50
150,647	Travelers' Portfolio Co.....	" 21, "	" 27, "	16 48
150,554	J. E. White.....	" 14, "	" 24, "	8 87
150,555	J. E. White.....	" 14, "	" 23, "	3
150,453	D. H. Young.....	" 7, "	Feb. 2, "	20
150,590	Second Ward savings bank, Milwaukee.	" 17, "	Jan. 23, "	360 17
150,605	Aultman, Miller & Co.....	" 18, "	" 23, "	29 30
150,584	Anderson Darnell.....	" 16, "	" 25, "	20
150,002	E. C. Marshall.....	Dec. 16, 1892	Feb. 10, "	10 68
150,609	J. K. Honeywell.....	Jan. 18, 1893	Jan. 25, "	50
150,638	N. O. Tiffany, sec'y.....	" 20, "	" 30, "	4 28
150,623	Fourth nat'l bank, Cincinnati.	" 20, "	" 25, "	194 12
150,634	W. A. Dilworth.....	" 20, "	Feb. 1, "	25

No.		Date of issue.	Date of protest.	Amount.
150,496	Dorr Bros.....	" 10, "	Jan. 26, "	30
150,600	Dorr Bros.....	" 17, "	" 25, "	65 30
150,608	Dorr Bros.....	" 18, "	" 25, "	66
150,613	J. H. Harley.....	" 18, "	" 24, "	37 91
150,660	W. D. Messenger & Co.....	" 21, "	" 26, "	9 75
150,659	Carpenter Paper Co.....	" 21, "	" 26, "	40
150,585	Esterly Harvesting Co.....	" 16, "	" 26, "	34 80
28				
150,273	A. K. Mayhew.....	Dec. 30, 1892	Jan. 27, 1893	43 90
150,597	First nat'l bank, Marietta, Ohio.	Jan. 17, 1893	" 23, "	100
150,559	D. M. Crouse.....	" 14, "	" 30, "	7 63
150,601	Rush H. Palmer.....	" 17, "	Feb. 10, "	75 65
149,773	J. C. Hutchinson.....	Dec. 5, 1892	M'ch 27, "	15
150,587	The John Von Range Co.....	Jan. 17, 1893	Jan. 23, "	5 55
150,646	City nat'l bank, Marshalltown.	" 21, "	" 26, "	98 50
150,536	O. F. Anderson.....	" 13, "	M'ch 1, "	10
150,620	First nat'l bank, Hartford, Conn.	" 18, "	Jan. 24, "	58 76
150,589	Merchants' and Mfrs.' nat'l bank.	" 17, "	" 24, "	54 75
150,650	Chemical nat'l bank, Chicago..	" 21, "	" 26, "	8 40
150,628	Burlington Wire Mattress Co..	" 20, "	" 26, "	91 44
150,592	Burlington Wire Mattress Co..	" 17, "	" 23, "	9 76
150,629	Anheuser-Busch Brewing Ass'n, St. Louis.	" 20, "	" 26, "	61 90
150,522	Exch. bank, Franklin, Pa.....	" 12, "	" 18, "	5,000
150,544	U. S. nat'l bank, Omaha.....	" 13, "	" 17, "	5,000
150,595	Chemical nat'l bank, N. Y.....	" 17, "	" 20, 1893	6,500
150,610	Chemical nat'l bank, N. Y.....	" 18, "	" 21, "	5,500
150,619	Chemical nat'l bank, N. Y.....	" 19, "	" 23, "	3,500
150,632	Chemical nat'l bank, N. Y.....	" 20, "	" 23, "	5,000
150,651	Chemical nat'l bank, N. Y.....	" 21, "	" 24, "	1,500
				\$44,264 66

The respondent then called as a witness Mr. WILLIAM J. QUINLAN, JR., who, having been sworn, testified as follows:

I am cashier of the defendant, The Chemical National Bank of New York, and have been for eighteen years. (Check for \$5,000, dated Jan'y 13, 1893, No. 150,544, drawn by the Capital National Bank of Lincoln, Nebraska, on the Chemical National Bank of New York, in favor of N. T. Barlow, cashier, shown witness.) When that check was presented for payment, the Capital National Bank of Lincoln had no deposits or funds on deposit with the Chemical bank out of which the check could be paid. At that time the account of the Capital national bank was considerably overdrawn. The mark "Not good" upon the check was made by me.

29 Cross-examined:

The account of the Capital national bank had been overdrawn for some time, off and on. May have been periods when they had a credit.

WILLIAM J. QUINLAN, JR.

The respondent then read in evidence two letters, which are as follows:

4589.

Capital stock, \$100,000.00.

The Packers' national bank.

SOUTH OMAHA, Neb., 1, 19, 1893.

Chemical nat. bank, New York.

DEAR SIR: Enclosed please find our draft No. 4811 on Fourth nat. bank, N. Y., for \$5,000.00 for credit and advice of parties named below.

Yours respectfully,

A. P. BRINK, *Cashier*.

Capital nat. bank, Lincoln, Neb. \$5,000. Rec'd Jan. 23, '93.

Schuster-Hax national bank.

ST. JOSEPH, Mo., Jan. 18, 1893.

Chemical nat'l bank, N. Y.

DEAR SIR: I enclose herein my draft No. 48278 on you for \$2,000.00 for the credit of the following accounts.

Yours truly,

S. A. WALKER, *Cashier*.

Capital nat'l bk., Lincoln, Neb. 2,000. Rec'd Jan. 23, '93.

30 & 31 The complainant then read in evidence the proofs above referred to in the case of Hayden vs. Williams and Dodd, which are as follows:

* * * * *

32 In the Circuit Court of the United States in and for the Southern District of New York, Second Circuit.

KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,
against
 GEORGE G. WILLIAMS and JOHN B. DODD, Respondents.

UNITED STATES OF AMERICA, } ss:
District of Nebraska,

Depositions of Kent K. Hayden, Deborah G. King, John D. Macfarland, Genio M. Lambertson, John A. Crumpton, M. D.
 33 Welch, Halleck C. Young, and S. K. Hale, on behalf of the complainant, begun on the 25th day of January, A. D. 1895, at ten o'clock in the forenoon of said day, and taken during the period from that time to the 6th day of February, 1895, as herein-after certified, before me, Frederick Shepherd, an examiner in chancery of the circuit court of the United States for the district of Nebraska, duly appointed by the judge of said court and said district, and qualified and residing in said district of Nebraska, pursuant to the annexed notice and order.

On the said 25th day of January, 1895, KENT K. HAYDEN, of lawful age, being by me first duly cautioned, examined and sol-

emuly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

K. K. HAYDEN, questioned by Mr. LAMBERTSON:

Q. Mr. Hayden, state your full name, age and business?

A. Kent K. Hayden, 39 years, banking business.

Q. What official position, if any, do you hold?

A. Receiver of the Capital National Bank of Lincoln, Nebraska.

Q. When were you appointed as such receiver?

A. May 24th, 1893, and I took charge of the business June 1st, 1893.

Q. Whom did you succeed as receiver?

A. John D. Macfarland.

Q. And when was he appointed receiver?

A. About the 1st of February, 1893.

Q. When did the Capital national bank suspend?

A. January 21st, 1893.

Q. Who took charge of it at that time?

A. The U. S. bank examiner.

Q. Did the books and business of the Capital national bank remain in the hands of one or more bank examiners from 34-36 the date of its suspension up to the time of the appointment of Mr. Macfarland as receiver?

A. Yes, sir.

Q. As receiver of the Capital national bank have you in your possession and custody all the books, papers, documents and assets of the Capital national bank?

A. Yes, sir.

Q. How long have you been engaged in the banking business, Mr. Hayden?

A. About 24 years.

Q. And what positions have you held in banks, and for what time?

A. Messenger, book-keeper, teller, assistant cashier, and cashier. I was cashier of a bank about 8 years. I have also been a United States national bank examiner.

Q. Do you, from your experience in the banking business, and its methods of book-keeping, consider yourself an expert accountant?

A. I think I am.

Q. Since you have been receiver of this bank, have you made a full and careful examination of the books of the Capital national bank?

A. Yes, sir.

Q. You may state, Mr. Hayden, when the Capital national bank was first organized, and whether that was its first name, and if not, when its name was changed?

Respondents object to the question as immaterial.

A. It commenced business as the Marsh National Bank of Lincoln, Nebraska, and was given a charter on the date of June 29th,

1883, by the Comptroller of the Currency, and changed its name to the Capital national bank about May 5th, 1884.

* * * * *

37-39 Q. Mr. Hayden, have you examined the books so as to be able to state the total amount of dividends paid by the said Capital national bank from the date of its organization to the date of its suspension?

A. Yes, sir.

Q. You may please state.

Respondents object as immaterial and not the best evidence.

A. The bank paid dividends from January 13th, 1885, to July 12th, 1892, inclusive, to the amount of \$253,000.00.

* * * * *

40 Q. Now, Mr. Hayden, are you able to state from your books the total assets and liabilities of the Capital national bank at the date of its suspension?

A. I am so far as ascertained.

Q. You may state what they are from the examination you have made of the books.

Respondents object as incompetent and immaterial, not the best evidence, and having no proper foundation laid.

41 A. The bills receivable of the Capital national bank amounted to \$991,971.30; other assets, \$65,357.53; real estate and equities in real estate, \$60,000.

Q. Mr. Hayden, state what the liabilities were of the Capital national bank at the date of its suspension?

Respondents object as immaterial, calling for a conclusion and not the best evidence.

A. \$1,435,605.63. That amount has been reduced in the sum of \$181,520.56 by the collection of bills receivable from their makers by banks holding endorsed paper of the Capital national bank.

Q. For what amount have claims been allowed against the bank?

Respondents object as immaterial and not the best evidence.

A. \$852,721.95.

Q. And what is the total amount of the claims that have been presented?

Respondents object as immaterial and not the best evidence.

A. Claims have been presented for all of the amount stated as liabilities, with the exception of a number of small amounts which would not aggregate a great deal.

Q. What is the situation of those claims that have not been allowed?

Respondents object as immaterial.

A. They are under consideration and in litigation.

Q. Can you state the amount of one of the large claims?

Respondents object as immaterial.

A. The claim of the treasurer of the State of Nebraska for about \$235,000 has not been allowed.

Q. Is that evidenced by certificates of deposit or entries in a pass book?

Respondents object as immaterial and not the best evidence.

42 A. It is evidenced by credits in the pass book of the State treasurer of Nebraska.

Q. Mr. Hayden, have you investigated, and made such an examination of the books of the Capital national bank as to be able to state from those books, and from other sources, what amount of those assets are good and what amount is bad—what are worthless?

A. Yes, sir.

Q. Have you such a knowledge and familiarity with the assets and signers of the bills receivable, and the property held by your trust, as to give an opinion as to the value of the assets and bills receivable?

A. Yes, sir.

Q. You may then state what, in your opinion, is their value?

Respondents object as immaterial, not the best evidence, no proper foundation laid, calling for a conclusion and speculative.

A. Of the bills receivable, \$236,935.62 are good, \$170,766.41 are doubtful, \$584,269.27 are worthless. Of the good bills receivable, \$187,270.56 are held by other banks. Of the doubtful bills receivable, \$29,375.14 are held by other banks. Of the worthless bills receivable, \$114,714.13 are held by other banks.

Q. What do you mean when you say they are held by other banks?

Respondents object as immaterial.

A. The notes were endorsed and sold by the Capital national bank to other banks. Of the assets, \$29,277.89 are good; \$19,290.71 are doubtful, and \$16,788.93 are worthless.

Respondents move to strike out all of the statements of the witness in regard to the assets and liabilities of the Capital national bank, for the reason that it is stating a conclusion of the witness, is immaterial, not the best evidence, and has no proper foundation laid.

43 Q. Mr. Hayden, you may state what investigations you have made, and state what the sources of your knowledge are as to the solvency of the signers of the bills receivable, and what your sources of information are as to the value or lack of value of the assets of the bank scheduled by you. State fully?

A. The figures are based upon my own knowledge of the paper, and information obtained from various other sources, upon inquiry such as a banker would make, from any one whom he thought

might have knowledge of the paper, and from attempts at collection.

Q. You may state whether any suits have been brought to collect the assets of the bank, and you may, if you can, give a schedule of the actions that have been commenced.

Respondents object as immaterial and not the best evidence.

A. A number of suits have been commenced. Where we thought that there was any prospect of collecting, suit has been brought. Where there was no prospect of collection suit has not been brought.

Q. Have judgments been obtained on any of the larger notes or indebtedness to the Capital national bank?

Respondents object as immaterial and not the best evidence.

A. Yes, sir.

Q. You may state, as near as you can, what judgments have been obtained.

Respondents object as immaterial and not the best evidence.

A. A judgment for \$84,294.48 against Charles W. Mosher.

Q. Who is Charles W. Mosher?

A. He was the president of the Capital national bank.

44 Q. During what period of time?

A. From its incorporation until its close.

Q. You may go on?

A. Judgment for \$58,091.00 against Richard C. Outcalt.

Q. Who was Richard C. Outcalt?

A. He was the cashier of the Capital national bank.

Q. During what period of time?

A. From the time of its incorporation until its close.

Q. State any other judgments?

Respondents object as immaterial and not the best evidence.

Q. You may state if a suit has been commenced against E. W. Mosher, and if so, for how much?

Objected to by respondents as immaterial and not the best evidence.

A. Yes, sir; suit has been commenced against E. W. Mosher for \$97,658.85.

Q. Who was E. W. Mosher?

A. He was a brother of C. W. Mosher, and resided in York county, Nebraska.

Q. And state what the financial responsibility and solvency of C. W. Mosher is, if you know?

Respondents object as immaterial and calling for a conclusion.

A. Insolvent.

Q. Do you know of the solvency or insolvency of Richard C. Outcalt?

Respondents object as immaterial and not the best evidence.

A. Yes, sir.

Q. You may state whether he is solvent or insolvent?

Respondents object as immaterial and not the best evidence.

A. Insolvent.

Q. Are you acquainted with the financial responsibility of E. W. Mosher?

A. Yes, sir.

Q. State whether he is solvent or insolvent?

45 Respondents object as immaterial and not the best evidence.

A. He is insolvent.

Q. Are these judgments that have been obtained against Mosher and Outcalt of any value?

Respondents object as immaterial and calling for a conclusion.

A. No, sir.

Q. Have there been any other judgments obtained?

A. Yes, sir; a number of them.

Q. Can you name them at the present time?

Respondents object as immaterial.

A. No, sir; I cannot.

Q. Will you make a schedule of the same and attach it to your deposition?

A. Yes, sir; I will.

Respondents object to the schedule, and object to its being attached, on the ground that it is immaterial and not the best evidence.

Complainant offers in evidence the schedule referred to and asks the examiner to attach it to this deposition and make it a part hereof.

Respondents object as immaterial and not the best evidence.

The said schedule is hereto attached, marked Exhibit 9, and made a part hereof.

Q. Mr. Hayden, can you name any of the bills receivable that you consider worthless?

A. Yes, sir.

Q. You may take up those that you consider worthless, and you may state what they are, giving their amounts.

Respondents object as immaterial, calling for a conclusion and not the best evidence.

A. Notes of the Western Manufacturing Company amounting to \$235,000. The notes of C. W. Mosher and Richard C. Outcalt, which I have already stated were in judgment.

46 Respondents renew their objection as calling for a conclusion of the witness.

A. (continued). Notes of E. W. Mosher to the amount of \$97,658.85; note of Falkenberg, \$2,041; note of M. C. Frank, \$2,120; O. O. Heffner, \$1,300; note of C. W. and W. W. Marsh, \$3,600; Marsh Binder Manufacturing Company, \$9,000; note of Sycamore Marsh Harvester Company, \$4,500; note of W. A. Sharar, \$7,103.76.

* * * * *

Q. Mr. Hayden, I want to ask you as to the \$141,000 of notes not on hand—as to their value?

Respondents object as incompetent, calling for a conclusion, and no proper foundation laid.

47 A. Of the \$141,011.44 bills receivable of the bank which were not on hand, only a small portion is collectable or good.

Q. When did these \$141,000 of notes mature?

Respondents object as immaterial.

A. Notes to the amount of \$701.37 matured previous to July 1, 1886—

Respondents move to strike out the answer of the witness as not pretending to be the personal knowledge of the witness, but witness appears to be testifying from slips of paper, as incompetent, and not the best evidence.

A. (continued). January 1, 1887, of these notes \$2,460.54 were past due; July 1, 1887, the amount of these notes past due was \$4,366.91; January 1st, 1888, the amount of these notes overdue was \$10,289.26.

Respondents object to the answer of the witness and move to strike it out as not responsive to any question, incompetent, immaterial, not pretending to be given from witness' own knowledge, but from slips of paper before him on his desk.

A. (continued). July 1, 1888, the amount of these notes overdue was \$13,495.41.

Respondents object to the answer, and move to strike it out as not responsive to any question, incompetent, immaterial, not pretending to be given from witness' own knowledge, but from slips of paper before him on his desk.

A. (continued). January 1, 1889, of these notes the amount of \$18,175.44 were overdue.

Respondents object to the answer, and move to strike it out as not responsive to any question, incompetent, immaterial, not pretending to be given from witness' own knowledge, but from slips of paper before him on his desk.

A. (continued). July 1, 1889, the amount of these notes overdue was \$21,415.15.

48 Respondents object to the answer, and move to strike it out as not responsive to any question, incompetent, imma

terial, and not pretending to be given from witness' own knowledge, but from slips of paper before him on his desk.

A. (continued). January 1, 1890, the amount of these notes overdue was \$27,409.93.

Respondents object to the answer, and move to strike it out as not responsive to any question, incompetent, immaterial, and not pretending to be given from witness' own knowledge, but from slips of paper before him on his desk.

A. (continued). July 1, 1890, the amount of these notes overdue was \$30,414.30.

Respondents object to the answer, and move to strike it out for the reason that it is not responsive to any question, immaterial, incompetent, and not pretending to be given from witness' own knowledge, but from slips of paper before him on his desk.

A. (continued). January 1, 1891, the amount of these notes overdue was \$38,040.27.

Respondents object to the answer, and move to strike it out as not responsive to any question, incompetent, immaterial, and not pretending to be given from witness' own knowledge, but from slips of paper before him on his desk.

A. (continued). July 1, 1891, the amount of these notes overdue was \$64,434.23.

Respondents object to the answer, and move to strike it out as not responsive to any question, incompetent, immaterial, and not pretending to be given from witness' own knowledge, but from slips of paper before him on his desk.

49 A. (continued). January 1, 1892, the amount of these notes overdue was \$78,641.18.

Respondents object to the answer, and move to strike it out as not responsive to any question, incompetent, immaterial, and not pretending to be given from witness' own knowledge, but from slips of paper before him on his desk.

A. (continued). The balance of the amount matured between January 1, 1892, and January 21, 1893.

Q. Amounting to how much?

Respondents object as immaterial, no proper foundation laid, not the best evidence, witness not testifying from his own knowledge or from the books, but merely reading slips of paper.

A. 62,370.26.

Q. Mr. Hayden, are these figures or data you have here taken from the books in your custody as receiver of the Capital national bank, by you?

A. Yes, sir.

Q. And all the figures and data which you have given in your testimony, except your opinions as to the solvency or insolvency

and worthlessness of the paper, is that derived from the books of the Capital national bank?

Respondents object as immaterial.

A. Yes, sir.

Q. Now, Mr. Hayden, I desire to call your attention to the \$235,000 of notes of the Western Manufacturing Company. You have stated that the notes of the Western Manufacturing Company were worthless. What knowledge have you upon which you base and give that opinion?

Respondents object as assuming a state of facts not proven, and as immaterial.

50 A. From my inability to collect any of them, and from my knowledge of the nature of the company, and from inquiries made of other parties.

Q. What do you know about that company?

Respondents object as immaterial, in no way involved in the issues in this case, and as appearing from the previous answer of the witness to be hearsay and therefore not competent.

A. About 10 years ago Mosher operated a business at the Nebraska State penitentiary under the style of the Western Manufacturing Company.

Respondents object to the answer of the witness and move to strike the same out as incompetent and immaterial.

A. And he sold the business to the Western Manufacturing Company incorporated, and since that time the only business that this manufacturing company has done is to manufacture notes. Mosher caused notes to be executed by E. Hurlbut, Jr., as manager, and discounted by the Capital national bank.

Respondents move to strike out all of the answer of the witness to the last question, for the reason that it is incompetent, irrelevant and immaterial.

Q. What do you mean by manufacturing notes?

A. Making and issuing notes.

Q. Has the Western Manufacturing Company been in business within the last five or six years, and has it had any place of business, or has the name simply been used by C. W. Mosher for the purpose of having notes issued, which were to be discounted and negotiated by the Capital national bank?

Respondents object as leading, calling for a conclusion and immaterial.

A. It had no place of business, and no business, and the name seems to have been used solely for the purpose of obtaining money upon its notes.

51 Q. Have you examined the books of the Capital national bank for the purpose of ascertaining how many of these

notes of the Western Manufacturing Company were discounted by the Capital national bank from first to last?

Respondents object as immaterial.

A. Yes, sir.

Q. How many of those notes?

Respondents object as not the best evidence, and as immaterial.

A. Notes to the amount of \$755,000.00 are shown by the records of the Capital national bank to have been discounted by it.

Q. And how many of those notes were paid or renewed?

Respondents object as immaterial and not the best evidence.

A. Notes to the amount of \$425,000.00 were paid by renewals.

Respondents move to strike out the last answer of the witness as stating a conclusion.

Q. Is there any fact connected with these notes, other than this; if so, state.

Respondents object as immaterial and not the best evidence.

A. Notes to the amount of \$155,000.00 were paid in some manner. I do not know how.

Q. Leaving on hand at the date of the suspension of the bank how many?

Respondents object as immaterial and not the best evidence.

A. \$175,000.00.

Q. Where were the rest of those notes?

Respondents object as immaterial and not the best evidence.

A. \$125,000.00 of this amount was on hand, and \$50,000.00 with the Chemical National Bank of New York; also notes of this
52 company to the amount of \$60,000.00, endorsed by the Capital national bank, were held by other banks.

Q. Making a sum total held by this bank and other banks of how much?

Objected to by respondents as immaterial and not the best evidence.

A. \$235,000.00.

Q. Have you a tabulated statement, showing the dates when these notes were issued, and the dates when discounted?

A. Yes, sir.

Q. Is it correct?

Respondents object as calling for a conclusion and immaterial.

A. Yes.

Q. Is the statement taken from the books of the Capital national bank in your hands?

Respondents object as immaterial.

A. Yes, sir; it is.

Complainant offers in evidence a tabulated statement, testified to by witness.

Respondents object as immaterial, and having no proper foundation laid, and not the best evidence.

Said tabulated statement is hereto attached and made a part hereof, marked Exhibit 11.

Q. Mr. Hayden, were any of these notes of this Western Manufacturing Company, that were held by the Capital national bank, at any time good?

Respondents object as leading, calling for a conclusion and immaterial.

A. No, sir; they were not.

Q. Was the Western Manufacturing Company solvent or insolvent at the time these notes were discounted, each and all of them?

Respondents object as leading, calling for a conclusion and immaterial.

A. It was insolvent; the company had no assets.

53 Respondents move to strike out the answer of the witness as stating a conclusion.

Q. Mr. Hayden, can you tell me the dates when these Marsh notes for \$17,100.00 were discounted?

Respondents object as immaterial, not the best evidence and calling for a conclusion.

A. I can't give you the date they were discounted, but they were among the bank's bills receivable December 14th, 1885. At that time they amounted to \$29,968.00, and were marked paid on the bills-receivable register of the bank, and the bills-receivable account, credited with the amount by a fictitious charge of the same amount to the "bills of exchange" account.

Respondents move to strike out the answer beginning with the words December 14, 1885, to the end, for the reason that it is not responsive, states a conclusion, and purports to be stating what the books show, the books not being offered, not the best evidence and immaterial.

Q. Are these data which you have given here obtained from the books of the bank?

A. Yes, sir.

Q. Will you give the book and page on which this entry is found?

Respondents object as immaterial.

A. Yes, sir; the credit on the bills-receivable account is found on Cash Journal B, folio 204.

Complainant offers in evidence from Cash Journal B, page 205, the line opposite the number 123, being as follows: "Bills of exchange, \$29,968.00."

By Mr. PETTIS:

Q. Did you make the entries in that book?

A. No.

Q. Were they made in your presence?

A. No.

54 Q. Do you know whether that is the original book of entries of the Capital national bank of your own knowledge?

A. No.

Respondents object to the offer as incompetent, immaterial and having no proper foundation laid.

(By Mr. LAMBERTSON:)

Q. Mr. Hayden, how do you know that the \$29,968.00 charged in the bills of exchange account refers to the Marsh notes?

Respondents object as assuming a state of facts not proven to exist, incompetent and immaterial, the witness apparently testifying from the same book to which the previous objection was made, and not testifying to any fact within his own knowledge.

A. Because the bills-receivable account is credited on the same day by Marsh notes aggregating the same amount, \$29,968.00.

Respondents object and move to strike out the answer, as witness is not now reading from the book, but from a sheet of paper, and not apparently testifying to any fact within his own knowledge.

Q. Are what are called the Marsh notes entered in the same book, on the opposite page?

Respondents object as immaterial, calling for a conclusion and not the best evidence.

A. Yes, sir.

Complainant now offers in evidence page 204 of the bills-receivable account, the following entries:

10,418.....	Marsh.....	\$4,888 00
10,461.....	Marsh.....	5,000 00
10,475.....	Marsh.....	2,500 00
10,502.....	Marsh.....	2,500 00
10,511.....	Marsh.....	5,000 00
10,519.....	Marsh.....	3,600 00
10,525.....	Marsh.....	2,000 00
10,527.....	Marsh.....	2,000 00
10,529.....	Marsh.....	2,500 00

55 (By Mr. PETTIS:)

Q. Mr. Hayden, that book which you have just been offering from is the same book you had a moment ago, is it not?

A. Yes, sir.

Q. A part of which was offered?

A. Yes, sir.

Q. And you know no more about the genuineness of the book now than you did then?

A. No, sir.

Respondents object as incompetent, immaterial, not the best evidence, and no proper foundation laid, and object to the question in the way it has been put, as it appears to be an attempt to read from the book and the account.

A list of the entries offered by the complainant is hereto attached and made a part of this deposition, marked Exhibit 13.

(By Mr. LAMBERTSON:)

Q. Have you traced these notes, or followed them through the books, so as to be able to state whether or not the renewals of them are now in your hands as receiver?

Respondents object as leading, suggestive, immaterial, incompetent and not the best evidence.

A. Yes, sir; I have them.

Q. And the unpaid notes heretofore described as Marsh notes, amount to how much?

Respondents object as incompetent and immaterial, and not the best evidence.

A. At this time \$17,100.00.

Q. That is the same amount on hand at the date of the suspension of the bank, is it not?

Respondents object as incompetent and immaterial, and not the best evidence.

A. Yes, sir.

56 Q. Were those notes or bills receivable of any value at the date you find them entered in the bills-receivable account, the date of December 14, 1885?

Respondents object as immaterial, calling for a conclusion, and not the best evidence.

A. No, sir; they were of no value at that time.

Q. Were the makers of them insolvent?

Respondents object as calling for a conclusion, immaterial, and leading.

A. They were.

Q. How do you know that?

Respondents object as immaterial.

A. Because they had failed previous to that time.

Q. And were they ever of any value, or were the makers of them solvent at any time between the time they were (discounted by the bank and) entered in the bills-receivable account, up to the time of the suspension of the bank?

Respondents object as leading, suggestive, immaterial, calling for a conclusion, and not the best evidence.

A. They were not of any value.

Q. Mr. Hayden, have you examined the books in your care and custody as receiver of the Capital national bank to see whether any of the bad debts were ever charged off during the existence of the bank?

Respondents object as leading, suggestive, calling for a conclusion, not the best evidence, and immaterial.

A. Yes, sir. No bad debts were charged off by the Capital national bank from its beginning until February 2, 1892.

Q. Can you tell from an examination of the books of the bank whether there were in fact any losses sustained by the bank?

Respondents object as immaterial, not the best evidence, and calling for a conclusion.

A. Yes, sir.

57 Q. You may go back, then, to the period when the bank sustained its first loss, so far as you have been able to ascertain, from an examination of the books and records of the bank.

A. In 1883.

Respondents object on the ground that no question is asked, immaterial and not the best evidence.

Q. State what it is.

Respondents object as immaterial, not the best evidence and no proper foundation laid for the admission of secondary testimony.

A. July 2, 1883, the books show the collection account, Marsh Bros., Mosher & Company, overdrawn \$14,573.32. On that date the general balance book shows \$10,000.00 deducted from this account by erasing the first figure, and another account, the Omaha national bank, increased in the amount of \$10,000.00.

Respondents move to strike out the answer for the reason that it is not the best evidence.

Complainant offers in evidence, in Balance Book 1, the line opposite the word "collection," and also the line opposite the Omaha national bank, page of Balance Book 1, for Monday, July 2, 1883:

"Collection ac.....	\$4,573.32
Omaha national bank.....	12,436.82

(By Mr. PETTIS :)

Q. Did you make the entries in the book which your counsel has just offered in evidence?

A. No, sir.

Q. Did you make the particular entry, or either of them, that he has offered?

A. No, sir.

Q. Were they made in your presence?

A. No, sir.

Q. Do you know anything about the genuineness of the same?

A. No, sir, not from my own knowledge.

58 Respondents object to the offer made by complainant as immaterial, incompetent, and no proper foundation laid for the introduction of the entry.

A copy of the lines in Balance Book 1, offered by complainant, is hereto attached and made a part hereof, marked Exhibit 14.

(By Mr. LAMBERTSON :)

Q. I call your attention to this line opposite "collection" and ask you to state whether or not, in your opinion, there has been an erasure in front of the figure 4 there.

Respondents object as immaterial, not the best evidence and no proper foundation laid.

A. Yes, sir, the amount has been changed from \$14,573.32.

Respondents object to witness stating the amount, as not responsive to the question.

A. (continued). Has been reduced to \$4,573.32.

Respondents move to strike out the answer of the witness as stating a conclusion, not the best evidence, and not responsive to the question.

Mr. LAMBERTSON: In this connection I desire to object to the ceaseless objections that are being put in here by counsel for respondents, which are not proper objections in equity, made before an examiner, and ask to have these objections, which fill a greater portion of the record and evidence than the answers, charged up against the respondents and their counsel.

Mr. PETTIS: Counsel for respondents supposed that in trying a lawsuit some competent evidence would be offered in any case before an examiner, and would like to have their time in attending to this matter charged up to the complainant.

59 Mr. LAMBERTSON: The testimony offered here is that of a skilled accountant who testifies solely from his knowledge and examination of the books, and as such is clearly competent, and admissible against a stockholder, the books being the books of the bank of which he was a stockholder and made by the officers and clerks of the bank, who are the agents of the stockholder.

Mr. PETTIS: We have no objection to the counsel testifying, but would like to have him sworn first.

Q. Mr. Hayden, what connection is there between the item opposite the Omaha national bank in this book—\$12,436.82—and the item of \$4,573.32 opposite the word collection in the same book?

Respondents object as immaterial, not the best evidence, and as calling for a conclusion.

A. One is made to balance the other.

Q. Explain fully how you know that? How the book shows that?

Respondents object as immaterial and not the best evidence, and book being the best evidence.

A. The amount as shown by the book as due from the Omaha national bank is \$2,436.82, which is raised \$10,000, by adding the figure 1 before the figure 2.

Q. You may state, if you can, from your examination of the books and your knowledge of handwriting, and as a skilled accountant, when, in your opinion, the alteration of the figures was made.

Respondents object as immaterial and not the best evidence.

A. The alteration was made Friday, July 27, 1883.

Q. How do you arrive at that?

Respondents object as immaterial and the voluntary statement of the witness.

60 A. Because the books show an erasure for every day until that date, inclusive, after which there is no erasure.

Q. And upon what do you base your testimony that the bank scored a loss at that time, and how much of a loss?

Respondents object as immaterial, not the best evidence, and no proper foundation laid for the witness testifying.

A. Because the book shows an overdrawn account, called the collection account, of \$14,573.32, and an overdrawn account against an account that is not good and is uncollectible, is not an asset, and is a loss.

It is agreed by the parties complainant and respondent that to each and every question put to the witness which asks his opinion as to the value of the assets of the Capital national bank, or the responsibility of its debtors, to each and every question asking the witness to testify as to the contents of books of the Capital national bank, and to each and every answer thereto, purporting or pretending to give the contents of books of the bank, and to each and every offer of tabulated statements or exhibits purporting to be copied from the books of the Capital national bank, and as to the condition of said bank and as to its liabilities and assets at any time between the 18th day of January, 1885, and the 13th day of July, 1892, and to the offer of the books, or any part thereof, of the Capital national bank, or to any testimony as to the losses incurred by said bank and as to the dates of the same during its existence, and to all questions as to whether or not any deductions from the profits were made for the losses claimed to have been suffered, the respondents shall be considered in all respects treated as having entered

61 an objection to the said questions and the answers thereto and the said exhibits and statements, upon the ground that they are immaterial, incompetent, not the best evidence, calling for and stating conclusions of the witness; and this stipulation shall

apply to each and every question and the answer thereto, and that upon the trial of this case these objections shall be considered and treated as made to each question and the answer thereto, the same as though written out in full by the examiner at this time.

This agreement is made to save costs and time.

Q. Now, Mr. Hayden, are there any other losses?

A. Yes, sir.

Q. You may state what they are?

A. July 2, 1883, the books show the stocks and bonds account charged with \$30,540.00.

Q. Where is that found—in what book?

A. The balance book showing the balances for that date, and the ledger.

Q. What page of the ledger?

A. Page 7, Ledger No. 1. The account is reduced, by the erasure of \$30,000 to \$540, and the \$30,000 is added to the bills-receivable account by changing the amount of \$248,029.33 to \$278,029.33.

Q. What does that show, Mr. Hayden?

A. It shows that the stocks and bonds account was not as represented, and that there were no stocks and bonds to the amount of \$30,540, and to cover up this apparent asset the bills-receivable account was increased in the sum of \$30,000 and the amount deducted from the stocks and bonds account.

Q. Now, can you point out in the book these changes and entries?

A. Yes, sir.

Q. You may produce the book showing the first entry?

A. This is the book, Balance Book 1.

62 Complainant offers in evidence from Balance Book No. 1, produced by witness and identified by him, under date of Monday, July 2, 1883, the following line, "Stock & bond, \$540," showing an erasure.

Also the line opposite "B. R.," as follows, "B. R., \$278,029.33," showing an erasure.

A copy of said entries is hereto attached, marked Exhibit 15, and made a part hereof.

Q. What does B. R. mean in this book, Mr. Hayden?

A. Bills receivable.

Q. You may state, Mr. Hayden, whether you are able to give an opinion, from your knowledge of books as an accountant and of handwriting, whether there has been a change or erasure of figures in front of the figures 540?

A. Yes, sir; I can. It plainly shows an erasure.

Q. And are you able to give an opinion as to whether any figures have been inserted or changed in the line opposite B. R.?

A. Yes, sir; it shows an erasure and change.

Q. How did these two items read, in your opinion, before the change?

A. The stock and bond account showed \$30,540.00 and the B. R. account showed \$248,029.33.

Q. Upon what do you base that opinion?

A. The footings for the aggregate balances have not been changed, showing that the changes and erasures in the balances were equal in amount. The ledger account of the Omaha national bank shows the balance to be \$2,436.82, and the balance book numbered 1 shows the amount to be \$12,436.82, which shows that \$10,000.00 was added to the amount on the balance book. The ledger account of the collection account shows the amount overdrawn to be \$14,573.32, and the general balance book shows the amount to be \$4,573.32, showing that \$10,000.00 had been deducted from the amount on the balance book. The ledger account of the stocks and bonds account and the bills-receivable account has been changed to agree with the balance book, but erasures in the stocks and bonds account were not complete for the different dates upon which the balances were changed, and on Tuesday, July 24, 1883, the figure 3 is plainly to be seen in the stocks and bonds account.

Q. What amount do you find from the books that the bank lost by virtue of these erasures and changes in figures?

A. \$30,000.00; \$30,000.00 in this last matter—in the stocks and bonds account—and \$14,573.32 in the collection account.

Q. Have you ascertained from the books any other losses which the bank had?

A. Yes; in 1884 the Capital national bank lost, from the failure of Donnell, Lawson & Simpson, bankers, New York city, \$28,174.70, which was concealed by the following entry: May 19, 1884, Chemical national bank, New York city, is charged with \$10,000.00, and the same amount credited to Donnell, Lawson & Simpson account; May 26, 1884, the Chemical National Bank of Chicago is charged with \$10,000.00, and the same amount credited to Donnell, Lawson & Simpson account; May 27, 1884, note of C. W. Mosher is discounted for \$8,174.70 by the Capital national bank, and the amount credited to Donnell, Lawson & Simpson's account to balance the account.

Q. Do you find from an examination of the books of the Capital national bank any other losses; if so, state them?

A. I haven't found any other particular losses, except bad paper.

Q. Can you state what the loss of this bank was during the first year of its existence?

A. Yes, sir.

Q. What was it?

64-66 A. January 13, 1885, the loss amounted to, as already enumerated, \$72,748.02.

Q. Now, were any of these items of loss ever charged off?

A. No, sir.

Q. When dividends were returned were deductions made from the profits for these losses?

A. No, sir.

Q. Mr. Hayden, you have testified as to the value or worthlessness of the Marsh paper to about \$29,000.00. At what date did that become worthless, and at what date were the makers of those notes insolvent?

A. At the time the notes were taken out of the bills-receivable account, December 14, 1885, and charged to the bills of exchange account some time prior thereto.

Q. What was the capital stock of the Capital national bank at the date of its organization?

A. \$100,000.

Q. When was it that its capital stock was increased?

A. The bank was organized with a capital of \$100,000, which was increased to \$200,000 June 2, 1884, and it was increased to \$300,000 July 21, 1886.

Q. So, Mr. Hayden, at the end of the first year the Capital national bank had about half of its capital stock wiped out by these losses to which you have testified?

A. Yes, sir.

* * * * *

67 Q. Mr. Hayden, you may state whether, from your examination of the books of the bank, you can tell whether there was any particular account in the bank that was manipulated for the purpose of covering up losses and providing basis upon which to return dividends?

A. Yes, sir.

Q. What account was that?

A. The interest-paid account.

Q. Will you produce the book that contains that account?

A. Yes, sir.

Q. You may do so. What book is this, Mr. Hayden, which you now hold?

A. This is the interest-paid account of the Capital national bank.

Q. What is the meaning of the interest-paid account?

A. The amount paid out by the bank for interest on deposits and for rediscounts.

Q. Does the interest-paid account usually contain credits as well as debits?

A. It should only include debits? Except that when a dividend is declared the amount should be balanced up, charging the account to undivided profits and crediting it by the amount charged to undivided profits.

Q. Can you point out in this account, any manipulation of the account? If so, you may do so.

A. Yes, sir. December 29, 1884, the account is credited with \$813.

Complainant offers from the interest-paid account, under date of December 29, 1884, the last line in that account, except the footings. "Cr. 12/29 \$813."

Exhibit 16.

68 Q. Mr. Hayden, is that entered in ink or pencil?

A. In pencil.

Q. The rest of the account is in what?

A. Ink, except the footings.

Q. What does that entry mean?

A. That entry was credited to the interest-paid account for the purpose of increasing its undivided profits so as to make a dividend.

Q. When the bank paid out interest it debited this account, did it?

A. Yes, sir; it debited it or charged it.

Q. So that credit in that account would indicate that the bank had received that much?

A. Yes, sir.

Q. Interest?

A. That much money.

Q. How do you know from the books that the bank did not receive \$813?

A. From the condition of the undivided-profit account, and from the fact that the interest-paid account cannot be, and should not be credited with money received for interest, but such money should be placed to the interest account, which account represents the interest received.

Q. Have you found numerous changes and entries on the credits in this account?

A. Yes, sir; I find numerous credits to the interest-paid account.

Q. From your knowledge and experience as an accountant, and the way books are kept, and your knowledge of handwriting, can you state whether this particular entry, and those to which I shall hereafter call your attention, are in a different handwriting and made at different times?

A. They are.

Q. Generally in red ink?

A. Red ink or pencil.

Q. You may now turn to the next item and state what that is?

A. April 14, 1888, the account is credited by \$2,500.

69 Q. What kind of ink is that written in?

A. Red ink.

Q. "14—Cr. a/c \$2,500."

A. Yes, sir.

Said entry offered as Exhibit 17.

Q. Mr. Hayden, I will ask you whether the date, 14th, there, comes in regular order.

A. No, sir; it comes after the 16th, and is accounted for by the fact that there is no place in this book to enter a credit. It is only made for debits or charges, and it appears at the bottom of the page, so that the amount can be deducted from the amount of the interest already paid at that date.

Q. Does it appear to have been entered after the footings?

A. Yes, sir; it was.

Q. What is the significance of that entry?

A. It is done for the purpose of increasing the apparent undivided profits so as to declare a dividend.

Q. Are all the other items on that page debits?

A. Yes, sir.

Q. And all the items in this book are debits except these occasional credit entries to which you are testifying?

A. Yes, sir.

Q. What is the next item?

A. June 9, 1888.

Q. What is the entry made on that page?

A. At the foot of page 58, after June 30.

Q. You may state whether there are any other credits on that page.

A. No, sir.

Q. What does that credit indicate there in your opinion?

A. It was done for the purpose of increasing the apparent undivided profits in order to declare a dividend.

Complainant now offers in evidence the last line on page 58 of the interest-paid account, and also the heading of the page, giving the year, "1888—Cr. June 9, \$1,500."

Copy of said line is hereto attached, marked Exhibit 18, and made a part hereof.

70 Q. Are there any other credits in this book?

A. Yes, sir; November 16, 1888, \$2,500.00.

Complainant offers in evidence the heading of page 65 of said interest-paid account, the year 1888, and the line on said page opposite November 16, "November 16, Cr. error \$2,500.00. \$2,500.00."

Exhibit 19.

Q. At what place in the back is that entry made?

A. This entry is made at page 65, about the middle of the page, after the footings of the total amount of interest paid to that time have been made, and is deducted from the footing.

Q. You may give the next entry.

A. September 30, 1889, \$7,000.00.

Complainant offers in evidence on page 83 of the interest-paid account, year 1889, the line opposite September 30, "By costs real est. \$7,000."

Exhibit 20.

Q. Mr. Hayden, is that entry made there before or after the footings?

A. It is made after the footings and the amount deducted from the footings.

Q. Give the next entry.

A. March 19, 1890, \$5,000.00.

Complainant offers in evidence from the interest-paid account, under heading of 1890, March, the line opposite 19, "Cr. \$5,000.00." Exhibit 21.

Q. Is that entry made after the footings?

A. Yes, sir; and the amount deducted from the footings.

Q. Turn to the next entry.

A. May 16, 1890, \$1,500.00.

Complainant offers in evidence on page 98 of the interest-paid account, the figures at the top of the page, 1890, and the month May, and then this line, "Credit N. Y., \$1,500.00."

71 Copy of said line is hereto attached, marked Exhibit 21½, and made a part hereof.

Q. Is that entry made before or after the footings?

A. Made after the footings and the amount deducted from the footings.

Q. What is the next entry?

A. June 3, 1890.

Complainant now offers in evidence on page 99 of said interest-paid account, the heading, 1890, the month, June, and then the following line, "3 Credit real est., \$2,500.00."

Copy of said entry is hereto attached, marked Exhibit 22, and made a part hereof.

Q. Is that entry made after the footings?

A. Yes, sir; and the amount deducted from the footings.

Q. What is the next entry?

A. May 19, 1890.

Complainant now offers in evidence from said interest-paid account, on page 98, the figures 1890, the month, May, and the following line, "19 Credit Chic. 2,000."

1 Copy of the said entry is hereto attached, marked Exhibit 23, and made a part hereof.

Q. What is the date of the next one?

A. May 21, 1890.

Complainant offers on page 98 of said interest-paid account, the figures 1890, the month, May, and the following line, "21 Credit N. Y. 1,500.00."

Copy of said entry is hereto attached, marked Exhibit 24, and made a part hereof.

Q. Give another.

A. The next is in September, 24, 1890, \$5,000.00.

Complainant offers in evidence on page 108 of said interest-paid account, the figures at top of page, 1890, the month, September, and the following line, "24 Cr. by real-est. ac. \$5,000.00."

72 Copy of said entry is hereto attached, marked Exhibit 25, and made a part hereof.

Q. You may give the next entry on the interest-paid account.

A. December 27, 1890, \$10,000.

Complainant offers in evidence on page 115 of the interest-paid account, the figures 1890, the month, December, and the following line: "27 Cr. S. & B. ac. \$10,000."

Copy of same is attached, marked Exhibit 26.

Q. What is the next one?

A. April 9, 1891, \$800.

Complainant offers in evidence on page 124 of the interest-paid account, the figures 1891, the month, April, and the following line, "Cr. Pris. Cent. 800."

Copy of said entry is hereto attached, marked Exhibit 27, and made a part hereof.

Q. What is the next?

A. May 7, 1891, \$7,200.00.

Complainant offers on page 127 of said interest-paid account, the year, 1891, and month, May, and the following line: "Credit 7,200.00."

Copy of said entry is hereto attached, marked Exhibit 28, and made a part hereof.

Q. What is the next that you have?

A. June 20, 1891, \$10,000.00.

Complainant offers in evidence on page 131 of said interest-paid account, the year, 1891; the month, June; and the following line, "20 Cr. by 10,000.00."

Copy of said entry is hereto attached, marked Exhibit 29, and made a part hereof.

Q. What is the next one?

A. September 25, 1891, \$14,000.00.

Complainant offers in evidence on page 140 of said interest-paid account, the year, 1891; the month, September; and the following line, "25 Cr. 14,000.00."

73 A copy of the said entry is hereto attached, marked Exhibit 30, and made a part hereof.

Q. Is that entry written in ink or pencil?

A. Written in pencil.

Q. Next?

A. December 31, 1891.

Q. Where is that found?

A. This credit appears in Journal F, page 278.

Complainant offers in evidence on page 278 of Journal F, under date of December 31, 1891, the following line, "612 Interest paid 15,000.00." Exhibit 31.

Q. Mr. Hayden, is there a debit and credit side to this book?

A. Yes, sir.

Q. And on which side of the book is this entry made?

A. On the debit side—to cash. On the left-hand side.

Q. What does that indicate?

A. It indicates a credit of \$15,000.00 to the interest-paid account.

Q. Does that indicate that the bank received that much money?

A. No, sir; the bank could not receive money on its interest-paid account.

Q. Well, what does it indicate then?

A. It indicates a credit to the interest-paid account for the pur-

pose of reducing the amount of the interest-paid account so as to increase the apparent undivided profits.

Q. Are there any others?

A. February 2, 1892, \$2,103.44.

Complainant now offers in evidence from the interest-paid account, on page 151, the year, 1892; the month, February; and the following line, "2— To bal. \$2,103.44."

Copy of said entry is hereto attached, marked Exhibit 32, and made a part hereof.

Q. Where is the next one?

A. May 4, 1892, \$5,000.00.

Complainant offers in evidence on page 158 of said interest-paid account, the year, 1892; the month, May; and the following line, "4 Credit by York \$5,000."

A copy of said entry is hereto attached, marked Exhibit 33, and made a part hereof.

Q. What was the total amount of the credits made in this interest-paid account?

A. \$108,916.44.

Q. What was the effect of these entries?

A. To increase the apparent undivided profits in that amount.

Q. How do you know that these credits are not *bona fide*, and represent profits?

A. For the reason that the interest-paid account can have no legitimate credits except at the end of a dividend period, when the amount is charged to profit and loss or the undivided-profit account, and further for the reason that I have been able to ascertain to what accounts the same amounts were charged when the credits were made, and find that they were fictitious, false credits, made for the purpose stated, to increase the undivided profits and earning account.

Q. Have you made a tabulated statement, Mr. Hayden, of the undivided-profit account for each six months?

A. Yes, sir.

Q. What does that statement show?

A. It shows the amount of interest paid, wages, expenses, on the debit side; and on the credit side, discount, interest and exchange, and the undivided profits brought forward from the previous six months' period, the amount of dividend declared, the amount passed to surplus, the net profits as shown by the books, the net profits as reported to the directors, and the amount of fictitious credit to the interest-paid account for each six months' period.

75 Q. Is this tabulated statement made up from the books of the Capital national bank in your custody?

A. Yes, sir.

Q. And is it correct?

A. I believe it to be correct in every respect, as shown by the books.

Q. What period does it cover?

A. From the close of the six months' period ending December 31, 1884, to the close of the six months' period ending June 30, 1892.

Complainant offers in evidence the tabulated statement testified to by witness, and asks that the same be made a part of this deposition.

The said statement is hereto attached and made part of this deposition, marked Exhibit 34.

Respondents object to this offer as not the best evidence, and no proper foundation laid.

Q. Mr. Hayden, is there any other book or ledger than this interest-paid account which shows these same false or fictitious entries of credit to the interest-paid account?

A. Yes, sir, the bank ledgers show the credits.

Q. Does that book indicate that these entries were made at the time the other entries were made in the book, or made subsequently?

A. The ledger shows the entries in regular order.

Q. What do you mean by regular order?

A. Made at the time stated, or the dates given in the account.

Q. Are they of the same dates as the entries made in the interest-paid account?

A. They correspond, with one exception, and that is clearly a clerical error.

Q. Is this the true date entered in the ledger?

A. Yes, sir.

Q. Now, from your knowledge as a book-keeper and as an expert accountant, what, in your opinion, were the true time or
76 times at which these various entries or credits were made in the interest-paid account? Were they made at the time the debits were entered in that book or subsequently?

A. They were made subsequently in the interest-paid account, generally a few days after the regular order of dates.

Q. How do you know that?

A. Because the date given is generally after a later date.

The further taking of these depositions was hereupon adjourned until 10 o'clock a. m., Saturday, January 26th, 1895.

At 10 o'clock a. m., Saturday, January 26th, 1895, the further taking of testimony in this case was resumed, as follows:

Q. Mr. Hayden, have you in your hands and custody the reports that were made from time to time by the cashier or the president and the directors of the Capital national bank to the Comptroller of the Currency?

A. Yes, sir; I have some of them.

Q. Have you the last report that they made?

A. Yes, sir.

Q. What was its date?

A. It was the report of the bank's condition at the close of business December 9, 1892.

Q. And how long was that before the suspension of the bank ?

A. A little over one month.

Q. You may produce that report.

A. This is it (handing counsel paper).

Q. Are you acquainted with the signatures of R. C. Outcalt, cashier, and C. W. Mosher, president, and C. E. Yates and R. O. Phillips, directors ?

A. Yes, sir.

Q. Do you know their handwriting ?

A. Yes, sir.

77 Q. You may state whether each of their signatures is attached to this report.

A. Yes, sir, they are.

Q. What date was the report made ?

A. December 15, 1892.

Q. Mr. Hayden, have you examined this report and compared it with the books of the bank ?

A. Yes, sir, I have.

Q. You may state whether or not the condition of the bank as reported in this report agrees with the books of the bank.

A. No, sir, it does not.

Q. From your examination of the books of the bank you may state in what respects and to what extent this report is false or untrue.

Respondents object as immaterial, not the best evidence, and no proper foundation having been laid.

A. The report states that the overdrafts amount to \$6,217.74. The general balance book and individual balance books show that the overdrafts amounted, at that late date, to \$16,764.05; the report states that the other real estate and mortgages owned amounted to \$38,617.92. The general balance books show that the real estate and mortgages owned amounted to \$110,352.04; the report includes in the amounts due from other banks \$2,800.00, Walsh & Putnam account; Walsh & Putnam were not bankers. The fictitious amount of \$25,000.00 is added to the amount due from banks in the report, also \$25,000.00 fictitious amount is added to the rediscount account in the report. The bills-receivable account, as per the books, was, \$686,321.01. The report shows this to be \$768,601.44, a part of the real-estate account and part of the overdrafts being included. Also, the amount of gold coin is increased in the sum of \$10,000

78 in the report more than the books show; that amount having been deducted from the cash items.

Q. Mr. Hayden, have you, from other records in the bank, and from claims or certificates presented, discovered any other discrepancies and errors in this report ?

Respondents object as immaterial and not the best evidence.

A. Yes, sir, I have.

Q. You may state them.

Respondents object as immaterial, and not the best evidence.

A. Neither the report nor the general balance book of the bank show its true condition. The report only showed liabilities amounting to \$702,686.62, aside from its capital stock surplus fund, undivided profits and circulating notes. Whereas, the true amount of liabilities as subsequently shown, amounted to about double the sum stated.

Q. What do you mean by subsequently shown?

A. By the claim presented to the receiver after the bank suspended, consisting of certificates of deposit and liabilities for endorsement on notes and other evidences of deposits.

Q. Were those all evidenced by certificates of deposit, bills payable and other evidences of indebtedness of the bank that were undoubtedly genuine and existed at the date of this report?

Respondents object as immaterial, not the best evidence and no proper foundation laid.

A. Yes, sir.

Q. Are there any other discrepancies in the report?

A. Yes, sir; the report stated that there were no bad debts, whereas the larger proportion of the total assets subsequently proved to be worthless.

Q. Well, were they worthless the time the report was made?

79 Respondents object as calling for a conclusion and as immaterial.

A. Yes, sir; they were.

Q. When were they found to be worthless?

A. Shortly after the suspension of the bank, January 21, 1893.

Q. Have you already in your examination described these bad debts due the bank more particularly?

A. Yes, sir; in speaking of the bills receivable and other assets of the bank.

Q. Have you found any other discrepancies or any other errors in that report?

A. No, sir.

Q. What class or kind of liabilities of the bank were covered up more largely than others?

A. The certificate of deposit account.

Q. What was the certificate of deposit account as shown by the report?

Respondents object as immaterial.

A. \$158,545.88.

Q. And how many certificates of deposit were in fact issued and outstanding?

Respondents object to the question as immaterial and not the best evidence.

A. More than five hundred thousand dollars.

Q. How far back had some of these certificates of deposit extended, Mr. Hayden?

Respondents object as immaterial, not the best evidence, and no proper foundation laid.

A. Most of the certificates had been issued within a year.

Q. Have you examined the books of the bank so as to be able to state whether many of these certificates of deposits were renewals of other certificates of deposit issued?

Respondents object as immaterial, not the best evidence, and no proper foundation laid.

80 A. Yes, sir; that is, new certificates had been issued in lieu of old ones from time to time as the old ones were presented.

Q. To whom were the largest of these certificates of deposit issued?

A. J. E. Hill, State treasurer.

Q. How much has been issued to him? You may give a complete account of these certificates, the dates of issue and the amounts.

Respondents object as immaterial, not the best evidence, and no proper foundation laid.

A. Three large certificates were issued to him, January 6, 1893, one for \$150,000.00, one for \$100,000.00 and one for \$35,357.85. These were issued to him in lieu of his balance on open account of \$185,357.85, and two certificates of \$50,000.00 each, which two certificates were issued, one December 23, 1889, and the other August 17, 1891.

Q. Have you in your possession the original certificates issued from time to time to J. E. Hill, State treasurer?

A. Yes, sir.

Q. You may produce them.

A. Here are the three large certificates issued January 6, 1893.

Q. How did these come into your possession?

A. They were deposited in the Capital national bank by J. S. Bartley, State treasurer, and were found by me when I was appointed receiver.

Q. How were they paid?

A. The amount of the certificates was placed to the credit of J. S. Bartley, State treasurer, by an entry in his pass book at the time he deposited them.

Q. Were they placed to his credit on the books of the bank?

A. No, sir; only the amount of \$35,357.85 was placed to his credit at that time. Subsequently \$100,000.00 was placed to his credit, but the \$150,000.00 was never placed to his credit on the books of the bank.

Complainant offers in evidence certificates of deposit numbered 28473, 28472 and 28471, and asks the examiner to make a
81 copy of said certificates and attach to this deposition and make the same a part hereof.

Respondents make no objection to the copies being attached in

lieu of the originals of the certificates, but do object to the certificates, original or copy, as immaterial.

Copies of said certificates are hereto attached and made a part hereof, marked Exhibits 35, 36 and 37.

Q. Mr. Hayden, in what book are entries made of the certificates of deposit issued?

A. The record of the certificates is kept in what is called the certificate of deposit register. And the account is also kept in the balance book of the bank.

Q. Have you that certificate of deposit register?

A. Yes, sir.

Q. You may produce it.

A. This is the book—the certificate of deposit register. (Producing the book.)

Q. You may turn to the entry there on January 6, 1893?

A. Yes, sir.

Q. No. 28473?

A. Yes, sir.

Q. For \$100,000.00?

A. Yes, sir.

Q. What was entered in the book there?

A. \$100,000.00.

Complainant offers in evidence from the certificate of deposit register the year 1893, the month January, and the following lines:

"State tr.	28,471	\$150,000		
Do.	28,472	35,357.85	1	16
Do.	28,473	100,000.00	1	19"

A copy of said entries is hereto attached, marked Exhibit 38, and made a part of this testimony.

Q. Mr. Hayden, what is the signification of the line drawn through the entry for \$35,357.85 and \$100,000.00?

A. That those certificates were paid.

Q. How?

82-85 A. The amount of those certificates was credited to the new treasurer, J. S. Bartley, in open account, which of course eliminated these certificates.

Q. Has the treasurer made a claim for the amount represented by these two items?

A. Yes, sir; also for the \$150,000.00, which was not placed to his credit on the books of the bank.

Q. Mr. Hayden, were there a large number of certificates of deposit issued for larger amounts than were entered in the books of the bank in the certificate of deposit register?

Respondents object to the question as immaterial.

A. Yes, sir.

Q. Have you examined the books and made a tabulated statement of these certificates, showing the amount issued for and the amount entered in the register?

A. Yes, sir.

Q. Can you tell the sum total of them?

Respondents object as immaterial, not the best evidence, and no proper foundation laid.

A. No, sir; I have not made a complete schedule, the number being very large.

Q. Can you state approximately the amount?

Respondents object as immaterial, not the best evidence, and no proper foundation laid.

A. I will furnish a list of them.

Complainant offers in evidence a tabulated statement or schedule of certificates of deposit issued, which do not agree with the entries made in the certificate of deposit register.

The said tabulated statement is hereto attached and made a part of this deposition, marked Exhibit 39.

* * * * *

86 Q. Mr. Hayden, by whom are these certificates of deposit signed?

A. C. W. Mosher, president; R. C. Outcalt, cashier, and J. W. Maxwell, assistant cashier, and O. E. Funke, assistant cashier.

Q. Are you acquainted with the handwriting of each of these persons?

A. Yes, sir; I am.

Q. And are their signatures attached to these several certificates of deposit that have been offered?

A. All but one.

Q. And whose is attach to that?

A. It is not signed at all.

Q. What one is that?

A. No. 25086, Harper notes, \$7,000.00.

87 Q. These are all original certificates which have been issued and marked paid?

A. Yes, sir.

Q. Mr. Hayden, have you examined the certificate of deposit register where these entries, that fail to correspond with these certificates of deposit appear, to see whether they have been changed or altered?

A. Yes, sir.

Q. And are you able to give an opinion on that point?

A. Yes, sir.

Q. You may state whether they have been changed or altered, in your opinion.

A. Yes, sir; in most cases the certificate of deposit register has been altered. In some cases the amount was originally entered on the record different from the amount of the certificate issued.

The further taking of these depositions was resumed January 30th, 1895, at 2 o'clock p. m., and proceeded as follows:

Q. Mr. Hayden, can you state from your examination of the books of the bank whether any claims have been allowed upon certificates of deposit that are marked paid upon the certificate of deposit register?

A. Yes, sir.

Q. And what do they amount to?

A. \$96,125.35.

Q. Have you made a tabulated statement of them?

A. Yes, sir.

Q. Is it correct?

A. It is.

Q. And taken from the books of the bank?

A. Yes, sir; taken from the certificates themselves found to be entered as paid upon the register, upon examination of the register.

Q. And which you have since allowed as receiver, and issued receiver's certificates for?

A. Yes, sir.

* * * * *

88 Q. Mr. Hayden, have you examined the books so as to be able to state the number of certificates of deposit outstanding, and their amounts, that differ from the entries made in the certificate of deposit registered at the date of the suspension of the bank?

A. Yes, sir; I have.

Q. And what do they amount to?

A. There were four certificates of \$5,000.00 each which the register shows to be, three of them for \$3.00 each and one for \$1.77.

Q. Mr. Hayden, were there two kinds of discrepancies, one between the amount of the certificate and the certificate register, and one between the certificate register and the report made to the comptroller, and still a different one, in fact, between the amount actually issued and that reported to the comptroller?

A. Yes, sir.

Q. Mr. Hayden, have you in your possession any other reports made by the bank or the cashier and directors to the Comptroller of the Currency?

A. Yes, sir.

Q. You may produce them?

A. Here are the original reports made by the bank to the Comptroller of the Currency.

Q. And what reports have you there? Give them, each one.

Respondents object to witness reading from the reports in his hands, and to these documents, as not the best evidence.

A. For the close of business September 25th, 1891, at the close of business December 2d, 1891, at the close of business March 1st, 1892, at the close of business May 17th, 1892, at the close of business July 12th, 1892, at the close of business September 30th, 1892, and at the close of business December 9th, 1892.

Q. From whom did you get these reports?

A. From the Comptroller of the Currency.

89 Q. And are you acquainted with the signatures of the officers and directors who have verified and attested the several reports?

A. Yes, sir; I am.

Q. And do you know these to be their genuine signatures?

A. Yes, sir; I do.

Q. And have you in your possession certified copies of those reports?

A. Yes, sir; I have.

Complainant offers in evidence copies of said reports to which witness has testified, certified over the seal and signature of the Comptroller of the Currency.

Respondents object as incompetent, irrelevant and immaterial and not the best evidence, and no proper foundation having been laid, and object to each one of the papers offered, the objection being to the entire offer and to the each individual sheet of the same. Exhibit 59.

Q. Mr Hayden, you have already testified to the discrepancies in the report made to the comptroller at the close of business on the 9th day of December, 1892. I now call your attention to the report made at the close of business on the 30th day of September, 1892, and ask you if you have examined the books of the bank, and whether you discovered from such examination any discrepancies between the report and the books, and if any were found you may state them.

Respondents object as not the best evidence.

A. Yes, I have examined the books, and found discrepancies, and made a complete statement of them. The overdrafts at that time, according to the books, amounted to \$26,208.07; in the report the amount as stated is \$3,971.48. The real-estate account according to the books was \$95,370.47; in the report the amount stated is \$38,617.94. The account of Walsh & Putnam, shown by the books to be \$2,800.00, is included in the report as due from banks.

90 The interest-paid account according to the books, \$7,226.45, is reported as stocks, securities, etc. The fictitious amount of \$20,000.00 is added to the amount due from the Chemical national bank. That is, the report shows \$20,000.00 greater than the books. The fictitious amount of \$20,000.00 is added to the rediscount account. That is, the rediscount account is \$20,000.00 more in the report than as shown by the books. The books show the bills-receivable account as \$678,773.67; the report shows the amount \$757,762.81, a part of the overdrafts and a part of the real estate being included therein. The stocks, securities, etc., account as per the books is \$325.00; the report shows it to be \$7,551.45, the interest-paid account, \$7,226.45, being included therein.

Respondents hereupon object to the testimony being given by the witness for the reason that it does not pretend to be taken from the books of the bank, but witness is apparently testifying from slips

of paper before him, and respondents move to strike out this answer of witness, and all of it, for that reason, and because the same is immaterial.

A. (continued). The report also states that there are no bad debts, as defined in section 5204 of the Revised Statutes, whereas the records show at that time a considerable amount of bad paper owned by the bank.

Q. Mr. Hayden, can you state from your examination of the books of the bank and from the comparison you have made of the entries in the books and records of the bank with the statement made to the comptroller, which is the nearer correct and truthful of the two?

Respondents object as immaterial.

A. You mean the report or the general balance book from which it was made?

Q. Yes.

A. The books were the nearest correct.

91 Q. Will you now examine the report made at the close of business on the 12th day of July, 1892, and state whether you have examined the books so as to be able to state whether that report is correct or not and in harmony with the books?

A. I have.

Q. You may take the report compared with the books of the bank, and point out the discrepancies, if any exist.

A. The books show—

Respondents object to the manner in which the answer is given, witness not testifying from the books and not pretending to do so, and respondents move to strike out the answer for that reason, and also because the same is immaterial and not the best evidence.

A. (continued).—the overdrafts to be \$13,748.36; the reports showed the overdrafts to be \$4,377.87. The account of Walsh & Putnam, shown by the books to be \$2,800, is included in the amount due from banks in the report. The bills-receivable account is shown by the books to be \$782,736.62. The report shows the bills receivable to be \$867,035.79. The books show the cash items to be \$10,000 more than does the report, and the report shows the amount of gold coin to be \$10,000 more than the books show. The report says that there are no bad debts as defined in section 5204 of the Revised Statutes, while the books show a considerable amount of bad debts owned by the bank at that time.

Respondents move to strike out the answer of the witness for the reason that it appears that witness is not testifying from the books or from the original reports, and for the reason that the same is incompetent and immaterial, and not the best evidence.

Q. You may now examine the report made at the close of business on the 17th day of May, 1892, and you may state
92 whether you have examined the books and compared them with the report so as to be able to state whether there are any errors or discrepancies in the report.

A. I have.

Q. You may now point out the discrepancies.

Respondents object because the witness appears to be testifying, not from the books or original reports, but from slips of paper in his hands, and for the reason that the same is immaterial and not the best evidence.

A. The books show the overdrafts to be \$14,004.34; the report shows the overdrafts to be \$4,994.32. The books show the real-estate account to be \$65,862.17; the report shows no real estate. The Walsh & Putnam account of \$2,800, as shown by the books, is included in the report in amounts due from banks. The books show the bills-receivable account to be \$863,417.84; the report shows the amount to be \$937,434.25. The report shows the amount of gold coin on hand \$20,000 more than the books show the gold coin to be. The report says there are no bad debts as defined by section 5204 of the Revised Statutes, while the books show a large amount of bad paper on hand and owned by the bank.

Respondents move to strike out the answer of the witness for the reason that it appears that witness is not testifying from the books or from the original reports, and for the reason that the same is incompetent and immaterial and not the best evidence.

Q. Mr. Hayden, have you examined the books of the bank and compared them with the report made at the close of business on the 1st of March, 1892, to the Comptroller of the Currency?

A. I have.

Q. If you have found any discrepancies or errors in that report you may point them out.

93 Respondents object, because the witness appears to be testifying, not from the books or from the original reports, but from slips of paper in his hands, and for the reason that the same is immaterial and not the best evidence.

A. The interest-paid account of \$2,585.86, as shown by the books, is included in the report in the amount due from banks. The real-estate account, \$61,279.53, as shown by the books, is included in the bills-receivable account in the report. The Walsh & Putnam account of \$2,800.00, as shown by the books, is included in the amount due from banks in the report. The amount of gold coin as shown by the books is \$9,690.00; the report shows the amount to be \$28,500.00. The report says there are no bad debts as defined in section 5204 of the Revised Statutes, while the books show a large amount of bad paper at that time in the bank.

Respondents move to strike out the answer of the witness for the reason that witness appears not to be testifying from the books or from the original reports, and for the reason that the same is incompetent and immaterial and not the best evidence.

Q. Mr. Hayden, have you examined the books and compared them with the report made at the close of business on the 2d day

of December, 1891, sent to the Comptroller of the Currency, so as to be able to state whether there are any discrepancies or errors?

A. I have.

Q. If you have found any discrepancies or errors please point them out.

Respondents object because the witness appears not to be testifying from the books or from the original reports, but from slips of paper before him, and for the reason that the same is immaterial and not the best evidence.

94 A. The books show the overdrafts to be \$41,372.29; the report shows the overdrafts to be \$3,164.20. The books show the real-estate account to be \$56,572.70; the report states no real estate. The Walsh & Putnam account, \$2,800, as shown by the books, is included in the report in the amount due from banks. The interest-paid account, \$14,792.48, as shown by the books, is included in the amount due from banks in the report. The fictitious amount of \$70,000 is added to the deposits in the report. The fictitious amount of \$40,000 is added to the bills-receivable account in the report. The fictitious amount of \$30,000 is added to the amount of cash on hand in the report. The amount of bills of exchange, \$10,583.88, as shown by the books, is included in the amount due from the Chemical national bank in the report. The real-estate account, \$56,572.70, as shown by the books, is included in the bills-receivable account in the report. The report says the bad debts as defined in section 5204 of the Revised Statutes are \$14,000; the books show a much larger amount of bad paper owned by the bank at that date.

Respondents move to strike out the answer of the witness, for the reason that witness appears not to be testifying from the books nor from the original reports, but from slips of paper before him, and for the reason that the same is incompetent and immaterial and not the best evidence.

Q. Mr. Hayden, have you examined the books of the bank and compared them with the report made to the Comptroller of the Currency, at the close of business on the 25th day of September, 1891?

A. I have.

Q. You may state whether or not you have found any discrepancies, and if so, point them out.

95 Respondents object, as witness appears to be testifying, not from the books or from the original reports, but from slips of paper before him, and for the reason that the same is immaterial and not the best evidence.

A. I have. The books show the overdrafts to be \$16,778.51; the report shows the amount to be \$4,250.65. The books show the real-estate account to be \$56,478.20; the report shows no real estate. The premium account, \$868.82, as shown by the books, is included in the amount due from banks in the report. The Walsh & Putnam account of \$2,800.00, as shown by the books, is included in the re-

port in the amount due from banks. The wages account, \$3,239.00 as shown by the books, is included in due from banks in the report. The rediscount account, \$198,571.52, as shown by the books, is stated in the report to be \$98,571.52, and \$100,000.00 is added to the deposits in the report. The report shows \$10,000.00 more legal-tender notes than the books show. The report shows bad debts to be \$12,000.00; the books show a much larger amount of bad paper.

Respondents move to strike out the answer of the witness for the reason that the witness appears to be testifying, not from the books nor from the original report, but from slips of paper, and for the reason that the same is immaterial and incompetent and not the best evidence.

Q. Have you examined the reports made to the Comptroller of the Currency at the close of business on the 9th of July, 1891, and the report made on the 4th day of May, 1891, and the report made on the 26th day of February, 1891, and compared them with the books so as to state whether there are any discrepancies?

A. No, sir; I have not.

Q. What is meant, Mr. Hayden, by the Walsh & Putnam account of \$2,800.00 in there? What is the significance of that?

96 A. The bank advanced the money to build the banking office, and got a paid-up lease for a certain term of years—

Respondents object as incompetent, irrelevant and immaterial.

A. (continued). But the lease had expired at the time these statements were made, and was not an asset or due from other banks.

Respondents move to strike out the answer of the witness as incompetent, irrelevant and immaterial.

Q. Mr. Hayden, to make clear a part of your testimony concerning about \$141,000.00 of bills receivable, I want to ask whether all the bills receivable of the bank were on hand at suspension?

A. No, sir; of the bills receivable only the amount of \$519,500.00 were on hand at suspension. Bills receivable to the amount of \$141,011.44 were shown by the books to be in the hands of various collection agents, and the amount of \$331,359.86 had been rediscounted or sold to other banks, endorsed by the Capital national bank.

Q. Mr. Hayden, you may state whether false or fictitious entries that were made in the books, and statements, and about which you have been testifying,—state what they were made for?

Respondents object as leading, calling for a conclusion and immaterial.

A. They were made for the statement to show the bank in better condition than it really was, and to show more net earnings or undivided profits, and are made for the same purpose in the books, and also made for the purpose of concealing losses, and its real condition, in the books.

Q. What do you include and mean by the word losses?

A. Bad debts, losses by failures, one by the failure of Donnell, Lawson & Simpson, bankers, New York city, which was covered up by various entries on the books.

97 Q. Well, do you include in the term losses any conversions or embezzlements by the officers of the bank?

Respondents object as leading, calling for a conclusion, and immaterial.

A. Yes, sir; losses and shortages of all kinds were covered up by false entries.

Q. You may state whether or not the books are accurate and correct as far as you have examined, except were the object and purpose was to conceal shortages and bad debts, and to make a better showing than the real condition of the bank justified?

Respondents object as leading, calling for a conclusion and immaterial.

A. Yes, sir; the books are correct with the exceptions spoken of. With one exception.

Q. State the exception?

A. December 24, 1889, a \$100,000.00 credit was added to the account of the State treasurer, which threw the books out of a balance to that extent for about three years.

Q. Have you the books before you?

A. Yes, sir; I have.

Q. In what book does that appear?

A. In the November and December, 1889, Balance Book Number 2.

Q. Was that \$100,000.00 entered in the other books of the bank?

A. No, sir; it was not.

Q. Can you state when that \$100,000.00 was put there? Was it put there when the footings were made or at some other time?

Respondents object as not the best evidence, and immaterial.

A. It was added to the State treasurer's account on that date, as stated, and the books did not balance from then until about three years, in the sum of \$100,000.00.

98 Q. Mr. Hayden, I notice upon examining this book that on the 24th day of December, at the opening of that day he had to his credit \$23,328.75, and was credited \$100,000.00, and was subsequently debited \$50,000.00, leaving at the close of business on that day to his credit \$73,328.75; I want to know whether his pass book showed that amount to his credit on that day, and whether that item appears anywhere else. State fully what you know about it from an examination of the books of the bank?

Respondents object because the question assumes to state the contents of books of the bank, as immaterial, calling for a conclusion and not the best evidence.

A. This credit of \$100,000.00 does not appear on the State tre

urer's pass book, but his book shows the same amount due from the bank as the bank's book- show.

Q. How do you know this?

Respondents object to the question as immaterial.

A. From proving the State treasurer's account with the books of the bank and finding it to agree with the books of the bank as to the amount.

Q. What effect did that false entry of \$100,000 have upon the situation and the condition of the bank, and what, if you know from an examination of the books, was the object of making that credit there?

Respondents object as leading, calling for a conclusion and immaterial.

A. The entry increased the bank's liabilities \$100,000, and was entered in the treasurer's account to supply the same amount which had been at some time previously taken from the account.

Complainant offers in evidence the heading of Balance Book No. 2, of Tuesday, December 24, 1889, and Thursday, December 26, 1889, and the entries on said page opposite "State treasurer."

"Total Dr."	Credits.	Balance.
\$50,000	\$23,328.75	\$73,328.75
	100,000.00 "	

Respondents object to this offer as incompetent, irrelevant and immaterial.

Said offer is hereto attached marked Exhibit 60.

Q. What date, Mr. Hayden, is the balance shown by the book?

A. It shows the opening balance December 26, 1889, which was the closing balance of December 24th, 1889, December 25th being Christmas.

Q. Mr. Hayden, how long after that discrepancy or error of \$100,000 was made was it made good, and how was it made good?

Respondents object as incompetent, irrelevant and immaterial, calling for a conclusion and leading.

Q. (continued). You may state from any knowledge you have obtained from an examination of the books of the bank.

Respondents object as incompetent, irrelevant and immaterial, calling for a conclusion and leading.

A. The notes of Mosher and Outcalt were put into the bank December 28, 1892, to the amount of \$100,000 to make the books balance.

Q. Who are Mosher and Outcalt?

A. The late president and and cashier respectively of the Capital National Bank of Lincoln, Nebraska.

Q. And were these notes of any value?

Respondents object as calling for a conclusion and immaterial.

A. They were of no value.

* * * * *

104 Q. Has the testimony which you have given here, and the results which you have tabulated, and the data which you have furnished and testified to, here before the examiner, obtained exclusively from the books, papers and records of the bank, except where you have been called upon to give an opinion independent of the books?

Respondents object as immaterial.

A. It is.

Q. Since you have been receiver, have those books been exclusively in your possession and under your control, and have the books been tampered with in any way or changed and altered, except so far as you have testified, in any way, since you became receiver and took possession of them?

Respondents object as leading, calling for a conclusion and immaterial.

A. They have been in my possession and exclusively under my control, and have not been tampered with in any manner.

105 Q. Mr. Hayden, you may state whether the books of the bank, and the records, are of great number and the bills receivable, and checks, and drafts, and transactions of the bank have been large and numerous, or whether they have been few?

Respondents object as immaterial.

A. They have been great in number, and large and numerous transactions.

Q. Are you willing, Mr. Hayden, as the receiver of this bank, to allow the counsel for the respondents herein to examine the books touching all matters about which you have testified, and are you ready and willing to produce them for their inspection, and are you willing to point out in the books all the data, and facts, and figures and transactions to which you have testified, and to furnish for their use in this case any data arising out of, or touching any matter about which you have testified in this case, and upon which they wish to cross-examine you?

A. I am.

MR. HAYDEN: I wish to correct my answer to the fourth question on page 25 of this deposition, by saying that I do not know the value of the notes at the time they were discounted by the bank.

Cross-examination by Mr. PETTIS:

Q. Mr. Hayden, when did you say the Capital national bank was organized?

A. I said a charter was issued to Marsh national bank by the Comptroller of the Currency under date of June 29th, 1883, and

that later the name of the bank was changed to the Capital national bank.

Q. When was that change made?

A. The change of name was authorized by the Comptroller of the Currency under date of May 14, 1884.

106 Q. Then the Capital continued with the business of the Marsh national?

A. Yes, I presume that would be the conclusion.

Q. At the time of this change of name, was the Marsh national bank carrying a large line of deposits and doing a large or considerable banking business in the city of Lincoln?

A. Yes, sir.

Q. Was it considered one of the leading banks of the city at that time?

A. I think it was so considered. I didn't reside in Lincoln then.

Q. Were you a national bank examiner at that time?

A. No, sir.

Q. You know, then, nothing about the condition of the Marsh national bank at the time of this change of name?

A. Nothing except what I have learned from an examination of the books of the Marsh and Capital national banks since I was appointed receiver.

Q. On page 6 of your examination-in-chief, Mr. Hayden, I notice that you testify that the dividends you say were paid to the stockholders were paid by checks or drafts to the non-resident stockholders. Were these paid in the usual and ordinary course of business?

A. Yes, sir; I would say so.

Q. What day of January, 1885, was a dividend declared?

A. It was declared January 13th, 1885.

Q. What were the total deposits of the Capital national bank on the 13th day of January, 1885? I mean all the money that was on deposit in that bank on that date.

A. The books show the amount to have been \$507,166.64.

Q. Was that the amount that was on deposit then?

A. I can only say that the books show that to have been the amount.

Q. Will you give me the day of the month the next dividend was declared?

A. July 14th, 1885.

107 Q. What was the total amount of money on deposit in the Capital national bank on July 14, 1885?

A. The books show the amount to have been \$601,625.32.

Q. Do you know whether that amount was there or not?

A. Only from what the books show.

Q. Can you give me the date when the next dividend was declared?

A. January 12th, 1886.

Q. What was the total amount of money on deposit in the Capital national bank on January 12th, 1886?

A. The books show the amount to have been \$385,834.63.

Q. Do you know whether that amount was there or not?

A. Only from what the books show.

Q. Can you give me the date when the next dividend was declared?

A. July 13th, 1886.

Q. What was the amount of money on deposit in the Capital national bank on July 13th, 1886?

A. The books show the amount to have been \$535,634.19.

Q. Do you know whether that amount was there or not?

A. Only from what the books show.

Q. Can you give me the date when the next dividend was declared?

A. January 11th, 1887.

Q. What was the amount of money on deposit in the Capital national bank on the 11th day of January, 1887?

A. The books show the amount to have been \$520,495.68.

Q. Do you know whether that amount was there or not?

A. Only from what the books show.

Q. Can you tell me when the next dividend was declared?

A. July 12th, 1887.

Q. What was the amount of money on deposit in the Capital national bank on the 12th day of July, 1887?

A. The books show the amount to have been \$790,291.36.

Q. Do you know whether that amount of money was there or not?

A. Only from what the books show.

108 Q. Can you give me the date when the next dividend was declared?

A. January 10, 1888.

Q. What was the amount of money on deposit in the Capital national bank on the 10th day of January, 1888?

A. The books show the amount to have been \$618,676.43.

Q. Do you know whether that amount was there or not?

A. I can only tell from what the books show.

Q. Can you give me the date when the next dividend was declared?

A. July 10, 1888.

Q. What amount of money was on deposit in the Capital national bank on the 10th day of July, 1888?

A. The books show the amount to be \$706,464.60.

Q. Do you know whether that amount was there or not?

A. Only from what the books show.

Q. Can you give me the date when the next dividend was declared?

A. January 8th, 1889.

Q. What was the amount of money on deposit in the Capital national bank on the 8th day of January, 1889?

A. The books show the amount to have been \$610,173.20.

Q. Do you know whether that amount was there or not?

A. Only from what the books show.

Q. Can you give the date when the next dividend was declared?

A. July 9th, 1889.

Q. What amount of money was on deposit in the Capital national bank on the 9th day of July, 1889?

A. The books show the amount to have been \$670,278.09.

Q. Do you know whether that amount was there at that time or not?

A. Only from what the books show.

Q. What was the date when the next dividend was paid?

A. January 14th, 1890.

109 Q. What amount of money was on deposit in the Capital national bank on the 14th day of January, 1890?

A. The books show the amount to have been \$515,870.66.

Q. Do you know whether that amount was there on that date or not?

A. Only from what the books show.

Q. Can you give the next date when a dividend was declared?

A. July 8th, 1890.

Q. What amount of money was on deposit in the Capital national bank on July 8th, 1890?

A. The books show the amount to have been \$729,623.31.

Q. Do you know whether that amount was there or not?

A. Only from what the books show.

Q. On what date was the next dividend paid?

A. January 13, 1891.

Q. What was the amount of money on deposit in the Capital national bank on the 13th day of January, 1891?

A. The books show the amount to have been \$637,878.59.

Q. Do you know whether that amount was there or not at that time?

A. Only from what the books show.

Q. Can you give the next date when a dividend was declared?

A. July 14th, 1891.

Q. What amount of money was on deposit in the Capital national bank on the 14th day of July, 1891?

A. The books show the amount to have been \$490,304.29.

Q. Do you know whether that amount was there or not?

A. Only from what the books show.

Q. When was the next dividend paid?

A. January 12th, 1892.

Q. What amount of money was on deposit in the Capital national bank on the 12th day of January, 1892?

A. The books show the amount to have been \$521,481.22.

Q. Do you know whether that amount was there or not?

A. Only from what the books show.

110 Q. Can you give the date when the next dividend was paid?

A. July 12th, 1892.

* * * * *

111-118 Q. And this Capital national bank was one, if not the leading bank in this city during the most of these years, was it not?

A. Yes, sir.

Q. Its stock sold for more than par, did it not?

Complainant objects to the question as incompetent and not proper cross-examination.

A. Yes, sir.

* * * * *

119 Q. Mr. Hayden, you have testified that C. W. Mosher
120-143 and R. C. Outcalt had notes in the Capital national bank
up until shortly prior to closing the doors of the bank.
These gentlemen, and each of them, were considered worth from
\$100,000 to \$250,000, were they not?

A. Yes, sir.

Q. And had property standing in their names at all times until
just prior to the failure of the bank, out of which at least \$100,000
could have been realized?

A. I do not know of real property to that amount.

Q. Real and personal?

A. Yes, sir.

* * * * *

144-152 Recross-examination by Mr. PETTIS:

Q. Mr. Hayden, these accounts were principally book accounts,
were they not?

A. The tabulated statement only refers to book accounts or open
accounts.

Q. These various individuals shown here on this tabulated state-
ment kept checking against this account right along at various times,
did they not?

A. Checking and depositing.

Q. And it happened sometimes that they had overdrawn on one
of these dividend periods, did it not?

A. Yes, sir.

* * * * *

153-155 Mrs. DEBORAH G. KING, being first duly sworn to tell the
truth, the whole truth and nothing but the truth, testified
as follows:

Questioned by Mr. LAMBERTSON:

Q. Mrs. King, what is your full name?

A. Deborah G. King.

Q. And what is your husband's name?

A. Shepherd H. King.

Q. How long have you resided in the city of Lincoln, Mrs. King?

A. Twenty-three years.

Q. Were you a depositor in the Capital national bank at the date
of its suspension?

A. I was.

Q. How much money did you have on deposit there at that
time?

A. The Doctor and I together had—the bank was owing us, the morning it closed its doors, \$26,105.80.

* * * * *

156 J. D. MACFARLAND, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Questioned by Mr. LAMBERTSON:

Q. You may state your name, age and place of residence.

A. John D. Macfarland, age 48; residence, Lincoln, Nebraska.

157 Q. How long have you resided in Lincoln, Mr. Macfarland?

A. Twenty-three years and better.

Q. What business have you been engaged in, Mr. Macfarland?

A. Largely in the land business most of my time. I was for about a year and nine months in the First national bank.

Q. Of Lincoln, Nebraska?

A. Of Lincoln, Nebraska; yes, sir.

Q. What position did you hold in that bank?

A. I was president of the bank—manager of it during that period.

Q. Are you a director of the First national bank at the present time?

A. Yes, sir.

Q. You also held the position of commissioner of the land office for the Burlington road, did you not, for a good many years?

A. Land commissioner, yes, sir, for quite a number of years.

Q. What official position, if any, did you ever hold in the Capital national bank or in connection with that bank?

A. I was appointed receiver of the Capital national bank after its failure, and acted in that capacity a little more than three months.

Q. At that time you resigned?

A. Yes, sir.

Q. And who succeeded you?

A. Mr. K. K. Hayden, the present receiver.

Q. Can you fix the date that you entered upon the duties of your office as receiver?

A. No; I cannot, exactly, but about the 20th of February, 1893?

Q. After you took possession of the books of the bank and its assets, did you make an examination as to the value of those assets, and did you make any investigation of them as to their value?

A. I did; yes, sir. I examined the assets and made an investigation of them, in accordance with my instructions from the Comptroller of the Currency,

Q. What was the nature of your investigation?

158 A. They were classed under the head of good, doubtful and worthless.

Q. Mr. Macfarland, did you, from your past connection with the First national bank and your knowledge of the banking business and the financial standing of the makers and signers of the bills re-

ceivable, feel yourself competent to pass, in a general way, upon the value of these assets?

A. Yes, sir; I thought I was reasonably competent from my experience, and in addition to that I got such information as I could from those who had been connected with the bank before its failure in promoting this investigation.

Q. State what, in your opinion, there were of bills receivable on hand at or about the time you assumed the duties of your office as receiver, that were good?

Respondents object as incompetent, irrelevant, and immaterial.

A. Well, I can only tell that from the record made at the time, as it was nearly two years ago, and I find from that record that I reported to the Comptroller of the Currency that I had classified the bills receivable as good to the amount of \$111,054.83.

Respondents move to strike out the answer of the witness, as it appears to be based on hearsay testimony.

Q. What was your opinion as to the other assets?

Respondents object as incompetent, irrelevant, and immaterial, no proper foundation laid, and not the best evidence.

A. I find that I also classified at that time, as doubtful, bills receivable to the amount of \$126,185.70, and as worthless \$282,359.47.

159 Q. And was that your opinion and is it now your opinion, in substance, of the correctness of the valuation of the bills receivable?

Respondents object as incompetent, irrelevant and immaterial, not the best evidence, and no proper foundation laid.

A. It was made at the time stated, from the best information I could obtain. Of course there were some changes afterwards. I have no doubt that a very considerable amount of those I had listed as good have since turned out to be worthless, in view of the changed condition of affairs in the country. I have not been familiar with the bills receivable, of course, since I resigned as receiver. These certainly expressed my opinion at that time.

Q. In forming your opinion as to the value of those that were good, did you include in the bills receivable that were known as good, those of R. C. Outcalt?

Respondents object as incompetent, irrelevant and immaterial.

A. Yes, sir; I find from the record that those were listed as good.

Q. Upon what did you base that opinion?

A. Upon the fact that there had been turned over by Mr. Outcalt certain securities that I deemed were sufficient to pay those notes.

Q. What were those securities?

A. They consisted of stock of the Lincoln Gas Company, some State warrants, and some individual notes, as I now recall.

Q. In the event it should be shown by other testimony that at

Mr. Outcalt's request those collaterals and securities had been applied upon his stock assessment, then what would be your opinion as to the value of those notes?

Respondents object as incompetent, irrelevant and immaterial, and assuming a state of facts not proven.

160 A. In that event I should regard the notes as worthless.

Q. Can you, from an examination of any memoranda which you made at that time, name a few of the larger lines of bills receivable that you considered worthless?

Respondents object as incompetent, irrelevant and immaterial, calling for a conclusion, and not the best evidence.

A. I would have to refer to the record made at that time for any general list of them. I recall the notes of the Western Manufacturing Company in a large amount, I have forgotten the sum, that were worthless; notes of E. W. Mosher, that were worthless; there is a note of C. W. and W. W. Marsh, for \$3,600, that I recorded as worthless; note of the Marsh Binder Manufacturing Company, \$9,000; note of the Sycamore Marsh Harvester Company, \$4,500.00; note of W. A. Sharrar, \$7,103.36; note of C. E. Turk for \$7,289.10. Those are all the larger ones except the Western Manufacturing Company and the Mosher notes.

Q. Did you class the notes of C. W. Mosher there as doubtful or as worthless?

A. Those are classed as doubtful, I see by the record.

Q. What would be your opinion now as to their value?

A. I should say now they are worthless.

Q. Mr. Macfarland, what is your opinion now as to the value of those bills receivable which you have enumerated there as worthless?

Respondents object as immaterial, calling for a conclusion, and no proper foundation laid.

A. I am still of the opinion that they are worthless. I have not hunted information concerning the parties since I made that statement or list.

Q. Did you classify the notes that were rediscounted, 161-165 and give an opinion as to their value to the comptroller?

A. I did not. I never saw those notes or had any record of them while I was receiver.

Q. Were there any notes outstanding in the hands of attorneys and banks and collecting agents at that time?

A. There were, yes, sir.

Q. Do you remember about the amount of them?

Respondents object as incompetent, irrelevant and immaterial.

A. I never could ascertain definitely the amount. The collection register in the bank showed, however, as I now remember, something over \$100,000 that was out in that way.

Q. Were they included and listed among these bills receivable that you—.

A. They were not, sir. This classification only covered the bills receivable that were actually in the bank and came into my possession as receiver.

Q. Have you an opinion as to the value of those bills receivable that were in the hands of collection agencies, which you say amounted to over \$100,000.00?

A. Yes, sir; I have an opinion.

Q. State what that opinion is?

Respondents object as incompetent, irrelevant and immaterial, and no proper foundation laid.

A. They were largely worthless.

* * * * *

166 Q. Is it not true, Mr. Macfarland, that the name of this bank was originally the Marsh national bank?

A. That is correct, yes, sir.

Q. And did it not change its name from the Marsh national bank to the Capital national bank because of the failure of the Marshes and of the Marsh Harvester Company?

A. I cannot swear to that. It was generally understood, I think, at that time that that was the reason for the change.

* * * * *

167-170 Recross-examination by Mr. PETTIS:

Q. The Marsh national bank was one of the leading banks here in the city, was it not?

A. Yes, sir.

Q. And had a large line of deposits?

A. A very considerable line; yes, sir.

Q. And the Capital national bank, at all times up until the time of its failure, was considered at least the second bank in standing in the city, was it not?

A. Yes, sir.

Q. And had a very large line of deposits?

A. Yes, sir; it was second in its business of deposits, and other business.

* * * * *

171 JOHN A. CRUMPTON, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Questioned by Mr. LAMBERTSON:

Q. Mr. Crumpton, what is your full name, age and residence?

A. John A. Crumpton, age 43; residence, Lincoln, Nebraska.

Q. How long have you resided in Lincoln?

A. I have lived there 10 years.

Q. Were you connected at any time with the Capital national bank?

A. Yes, sir.

172 Q. What was your connection?

A. I was a book-keeper.

Q. What books did you keep?

A. I kept one of the individual balance books.

Q. How long were you such book-keeper, and between what dates?

A. From June 20, 1887, until the failure.

Q. Did you know C. W. Mosher and Richard Outcalt, the president and cashier of that bank?

A. Yes, sir.

Q. What position are you holding now?

A. I am book-keeper for the receiver.

Q. Have you in your hands the individual balance book of 1889 and for the date December 24th and 26th, 1889, before you?

A. Yes, sir.

Q. I direct your attention to an entry of \$100,000 placed in that book on the date of December 24th, and ask you how that entry came to be made there. State fully?

Respondents object as incompetent, irrelevant and immaterial, calling for a conclusion and not best evidence.

A. Mr. Mosher came to me and told me he wanted me to place \$100,000 to the credit of the State treasurer, and to drop it from the balances, the totals or the footings.

Q. What do you mean by dropping it?

A. Not to include it in the footings.

Respondents move to strike out so much of the answer of the witness as purports to give what Mr. Mosher told him, as hearsay, incompetent and immaterial.

Q. When did you put that in there?

Respondents object to the question as immaterial.

A. On the 24th day of December, 1889.

Q. What effect did it have on the balance?

173 Respondents object as immaterial and not the best evidence, incompetent and calling for a conclusion.

A. It placed \$100,000 to the State treasurer.

Q. When you made entries like that what did you usually have before you as the basis of such entry?

Respondents object as immaterial and not the best evidence, and also as incompetent.

A. A deposit ticket.

Q. Was there any charge or debit ever made to offset this \$100,000?

Respondents object as not the best evidence and calling for a conclusion.

A. No, sir.

Q. How long was that credit carried on the books of the bank?

Respondents object as incompetent and calling for a conclusion and not the best evidence.

A. Until the 28th day of December, 1892.

Q. Over three years?

A. Yes, sir.

Q. Did that throw the books out of balance that much?

Respondents object as incompetent, not the best evidence, and calling for a conclusion.

A. Yes, sir.

Q. How was it fixed then?

Respondents object as incompetent, not the best evidence, and calling for a conclusion.

A. A certificate was issued for \$100,000 and I was instructed not to include that in the account.

Q. How was it fixed finally at that time?

Respondents object as incompetent, irrelevant and immaterial.

A. There was \$70,000 of bills receivable, the notes of Outcalt and C. W. Mosher, and a check for \$30,000 of Mosher and Outcalt.

Q. What was that check drawn on? What account?

174-184 Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. The account of Mosher & Outcalt.

Q. Are there any other entries made in that book besides that, at Mr. Mosher's request, for which you did not have a deposit slip?

Respondents object as incompetent, irrelevant and immaterial.

A. No, sir.

Q. Is the book accurate and correct in other respects?

Respondents object as incompetent, irrelevant and immaterial.

A. Yes, sir, it always balances perfectly.

Q. Were the other entries in the book there set down at the time they were made?

A. Yes, sir.

Q. Was this entry of \$50,000 put in there on the 24th of December, 1889?

A. Yes, sir.

Q. And this entry of \$23,328.75?

Respondents object as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. And when was the balance entered, \$73,328.75? When was that put in there?

Respondents object as incompetent, irrelevant and immaterial.

A. That was probably put down the next day.

Q. The balance at the close of business, December 24th, 1889, would be how much?

A. \$73,328.75.

Q. Is this book, and the other individual balance books kept by you running through these years, accurate and correct in every respect except for this \$100,000?

A. Yes, sir.

* * * * *

185 HALLECK C. YOUNG, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Questioned by Mr. LAMBERTSON:

Q. Mr. Young, give your name, age, residence and business?

A. Halleck C. Young; residence, 156 South 33d street, Lincoln, Nebraska; business, real estate, insurance and loans.

186 Q. What position did you hold in the Capital national bank prior to its failure?

A. I run what is called the bills-receivable book. That is what we always called it.

Q. And what was your duty in connection with that book?

A. I entered up all the notes, and kept this book, and kept a regular set of books. We had what is called the register of the bills discounted, and we entered up each month's bills separate, and then we kept a journal and ledger, and at night each day I got the notes that were given and the notes that were paid; they were given to me on tickets and I entered them up.

Q. In this bills-receivable book or register?

A. I entered all the notes in the bills-receivable book and entered all the notes in the ledger.

Q. Did you make the entries in there?

A. Yes, sir.

Q. Have you before you now the bills-receivable register that was on hand at the time of the failure of the bank—the bills-receivable book?

A. Yes, sir.

Q. Are these your entries?

A. Yes, sir.

A. Were the entries that were made in that book set down from day to day in the regular course of business?

A. Why, they might have been sometimes a day or two behind, but they were set down each day in the regular course of business each day; they might not have been entered that particular day; they might have been two or three days back, but they were entered up in regular order as they came in.

Q. Is that book kept correctly, and are the items truly and correctly set down in there, that appear in the book?

A. Yes, sir, they were absolutely correct.

187 Q. Have you looked over the bills-receivable register so as to be able to state the total amount of bills receivable on hand at that time?

A. I compiled lists at that time, and I should say this was the list right here before me, taken right from the book.

Q. You are now looking at a memorandum or tabulated list made at or before the failure, and taken from the bills-receivable register before you.

A. Yes, sir; this is the one here.

Q. You may state from an examination of the memorandum and tabulated statement made by you at the time—refresh your memory from that and state the amount of bills receivable on hand at that time in the bank.

Respondents object as incompetent, irrelevant and immaterial, not the best evidence and no proper foundation laid for the introduction of secondary evidence, and for the reason that the books have not been identified in the manner and form required by the statutes of the State of Nebraska.

A. Does that mean the total amount as the books show?

Q. Yes, on hand.

A. Not including those out for collection?

Q. No, not including those out for collection.

A. According to the tabulated statement it shows \$529,600.00 on hand and out for collection \$141,011.44.

Respondents move to strike out the answer of the witness to the last question as not the best evidence, having no proper foundation laid, and immaterial.

Q. Was the \$141,000, that was out for collection, a part of the bills receivable that belonged to and were owned by the bank at the time of suspension?

Respondents object as immaterial, leading, calling for a conclusion and incompetent.

188 A. Yes, sir, all these are shown by the books, when the bills were discounted, and all those accounts are taken from the books.

Q. Just give the title of this book, if you will.

* * * * *

189 S. K. HALE, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Questioned by Mr. LAMBERTSON:

Q. You may state your name, age, residence and business.

A. My name is S. K. Hale, my age 52. I live at 332 South 27th street, Lincoln, and my business at the present time I am engaged at the Lincoln hotel.

Q. As book-keeper?

A. As book-keeper; yes, sir.

Q. Were you employed in the Capital national bank, and, if so, during what period and in what capacity?

A. Yes, sir; I was employed in the Capital national bank for a

number of years in the capacity of book-keeper. I had charge of the general books.

Q. During what years?

A. I think from about 1880 up to the close of the bank. About 12 years, perhaps a little longer than that.

Q. Did you keep the book known as the interest-paid account?

A. Yes, sir.

Q. Were you keeping that at the time of the failure of the bank?

A. Yes, sir.

Q. Were you keeping it in December, 1884?

A. Yes, sir.

Q. Have you that book in your hands at the present time?

A. I have.

Q. What items are entered in the interest-paid account. What is the significance of a book entitled the interest-paid account?

Respondents object as immaterial and incompetent and calling for a conclusion.

190 A. All these items that are entered here are the interest on everything almost you could mention. Certificates of deposit, and so on.

Q. Does that mean interest received by the bank or does it mean interest paid by the bank on certificates of deposit?

Respondents object as incompetent, irrelevant and immaterial, calling for a conclusion and not the best evidence.

A. This is interest paid.

Q. By whom?

Respondents object as incompetent, irrelevant and immaterial, not the best evidence and calling for a conclusion.

A. By the Capital national bank.

Q. So the meaning of the interest-paid account is an account in which items of interest paid on deposits or by the bank are entered?

Respondents object as incompetent, irrelevant and immaterial, calling for a conclusion and not the best evidence.

A. Yes, sir.

Q. Now, when are those entries in the book made.

Respondents object as incompetent, irrelevant and immaterial, calling for a conclusion and not the best evidence.

A. They are made almost daily, whenever the interest accrues.

Q. They are then entered in that book.

Respondents object as incompetent, irrelevant and immaterial, calling for a conclusion and not the best evidence.

A. Yes, sir.

Q. Do you mean when interest accrues or when it is paid?

Respondents object as incompetent, irrelevant and immaterial, not the best evidence and calling for a conclusion.

191 A. When it is paid.

Q. When it is paid it is put in that book?

Respondents object as incompetent, irrelevant and immaterial, calling for a conclusion and not the best evidence.

A. Yes, sir.

Q. And were the entries that were made in that book then contemporaneous with the transactions and with the payments of interest?

Respondents object as incompetent, leading, suggestive and no proper foundation laid.

A. Yes, sir; they were.

Q. And were the items that are entered in that book correctly entered by you from time to time?

Respondents object as leading, suggestive and no proper foundation laid, and as incompetent.

A. I got these items from clips of paper—yes, sir. They are correctly entered.

Q. Where did you get the items that you entered in that book from time to time?

Respondents object as incompetent, irrelevant and immaterial, not the best evidence and calling for a conclusion.

A. I got these items from slips made as a rule by the president, sometimes the cashier—they were made inside the cage. These items here are based upon those slips that were handed to me.

Q. Being debit slips?

A. Yes, sir; debit slips.

Q. How often was the account balanced?

Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. Every six months is my recollection.

Q. You may now turn to the page of the book under date of December 29, 1884.

A. December 29, 1884. I have it here.

Q. Is there a credit there of \$813.00?

192 Respondents object as immaterial and incompetent and not the best evidence.

A. Yes, sir.

Q. Who made that entry?

Respondents object as incompetent and immaterial and not the best evidence.

A. I made the entry. At least, it appears like my figures.

Q. In your handwriting?

A. Yes, sir.

Q. From what did you make that entry?

Respondents object as incompetent, immaterial and not the best evidence.

A. I would make that from one of those slips I was speaking of.

Q. And is the entry correct as taken from some slip that was handed to you at the time?

A. Yes, sir.

Q. What was the effect of that entry?

Respondents object as calling for a conclusion, incompetent and immaterial.

A. The effect of it would be to reduce the interest-paid account.

Q. And would the effect of it be to increase the apparent earnings of the bank?

Respondents object as calling for a conclusion, incompetent and immaterial.

A. Yes, sir; of course.

Q. You usually balanced this book at the time a dividend was returned, did you not?

Respondents object as calling for a conclusion, incompetent and immaterial.

A. Yes, sir.

Q. And that was every six months?

A. Every six months is my recollection of it; yes, sir.

Q. You may now turn to the entry of the date of April 14th, 1888. Do you find there a credit entry of \$2,500.00?

Respondents object as incompetent and immaterial and not the best evidence.

193 A. Yes, sir.

Q. On what page of the book is that found?

A. Page 55.

Q. In whose handwriting is that entry?

A. That is in mine.

Q. And was that correctly entered by you?

A. Yes, sir.

Q. From some slip?

A. From a slip, the same as the rest of them.

Q. And what is the effect of that entry of credit?

Respondents object as incompetent, irrelevant and immaterial and calling for a conclusion.

A. The effect would be to reduce the interest-paid account just the same as the other.

Q. And to increase the apparent earnings of the bank?

Respondents object as incompetent, irrelevant and immaterial and calling for a conclusion, and not the best evidence.

A. The effect would be to reduce the interest-paid account just the same as the other.

Q. And to increase the apparent earnings of the bank?

Respondents object as incompetent, irrelevant and immaterial and calling for a conclusion and not the best evidence.

A. Yes, sir, to increase the apparent earnings of the bank.

Q. You may turn to June 9, 1888. Do you find there a credit of \$1,500.00?

A. Yes, sir.

Q. On what page is that found?

Respondents object as incompetent, irrelevant and immaterial, not the best evidence, and calling for a conclusion.

A. On page 58.

Q. Is that in your handwriting?

194 Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, sir.

Q. Is the entry correct?

Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, sir.

Q. What is the effect of that entry?

Respondents object as incompetent, irrelevant, immaterial, not the best evidence, and calling for a conclusion.

A. The effect of that entry would be to reduce the interest-paid account and increase the apparent earnings of the bank.

Q. You may turn to the date of November 16, 1888. Do you find there an entry, a credit of \$2,500.00?

Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, sir.

Q. And in whose handwriting?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. It is my handwriting.

Q. Is the entry correct?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

Q. And what is the effect of that credit entry?

Respondents object as incompetent, irrelevant, immaterial, not the best evidence and calling for a conclusion.

A. To reduce the interest-paid account and increase the apparent earnings of the bank.

Q. Turn to the entry of June 28th, 1889. Do you find there a credit of \$15,000?

Respondents object as incompetent, irrelevant, immaterial, not the best evidence.

195 A. Yes, sir.

Q. In whose handwriting is that?

Respondents object as incompetent, irrelevant and immaterial, not the best evidence.

A. That is my handwriting.

Q. And what is the effect of that entry?

Respondents object as incompetent, irrelevant and immaterial, and not the best evidence and as calling for a conclusion.

A. The effect of that entry would be just the same as the others, to reduce the interest-paid account and increase the apparent earnings of the bank.

Q. Is that correctly entered?

Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, sir.

Q. Turn to the entry of September 30th, 1889. Do you find there a credit for \$7,000.00?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

Q. On what page is that found?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. On page 83.

Q. In whose handwriting is it?

Respondents object as incompetent, irrelevant, and immaterial and not the best evidence.

A. It is in my handwriting.

Q. What would be the effect of that entry?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. The effect of it would be to reduce the interest-paid account and add to the apparent earnings of the bank.

Q. It is a credit, is it?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. It is a credit; yes, sir.

196 Q. You may turn to the entry of March 19th, 1890. Do you find there a credit entry of \$5,000?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

Q. What is that—a credit?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Yes, sir; it is a credit.

Q. What page is it found on?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. On page 95.

Q. Is it in your handwriting?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Yes, sir.

Q. And is it correct?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir; it is correct.

Q. What is the effect of that entry?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. To reduce the account and add to the apparent earnings.

Q. Turn to the entry for May 16, 1890. Do you find an entry there for \$1,500.00.

Respondents object as incompetent, immaterial and irrelevant and not the best evidence.

A. Yes, sir.

Q. In whose handwriting is it?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. It is mine.

Q. Is it correct?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

197 A. Yes, sir; it is correct.

Q. And what is the effect of that entry?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. The effect would be just the same as the rest, to reduce the account and add to the apparent earnings.

Q. On what page is that found?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. On page 98.

Q. You may turn to June 3, 1890. Is there a credit there of \$2,500.00?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

Q. And in whose handwriting?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. It is in my handwriting.

Q. And on what page is it?

Respondents object as incompetent, irrelevant and immaterial.

A. On page 99.

Q. Is it correctly entered?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Yes, sir.

Q. What effect does that have?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. To reduce the interest-paid account and add to the apparent earnings of the bank.

Q. You may turn to the date of May 19th, 1890, \$1,000.00.

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Yes, sir.

198 Q. In whose handwriting is that?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. It is in my handwriting.

Q. Is the entry correct?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Yes, sir.

Q. What page is it on?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. On page 98.

Q. What is the effect of that?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. To reduce the interest-paid account and add to the earnings.

Q. Turn to May 21, 1890, \$1,500.00?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. I have it.

Q. In whose handwriting is it?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. It is my handwriting.

Q. Was it correctly entered?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Yes, sir.

Q. On what page is it?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Page 98.

Q. And what is the effect of it?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. The effect is to reduce the interest-paid account and add to the earnings of the bank.

199 Q. Turn to the date of September 24, 1890. Do you find there an entry for \$5,000.00?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

Q. In whose handwriting is it?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. It is mine.

Q. And is it correctly entered?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir; it is.

Q. And what is the effect of it?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. The effect would be to reduce the interest-paid account and increase the apparent earnings.

Q. What page is it on?

Respondents object as incompetent, irrelevant, and immaterial and not the best evidence.

A. Page 108.

Q. Look at the date September 27th, 1890. Do you find there a credit for \$10,000.00?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

Q. And on what page is it?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Page 115.

Q. In whose handwriting?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. My handwriting.

Q. And what is the effect of that entry?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

200 A. The effect would be to reduce the interest-paid account and add to the earnings of the bank.

Q. You may turn to April 9, 1891. Do you find a credit there for \$800.00?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

Q. In whose handwriting?

Respondents object as incompetent, irrelevant, and immaterial and not the best evidence.

A. It is mine.

Q. Is it correctly entered?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

Q. What is the effect of the entry?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. The effect would be to reduce the interest-paid account and increase the earnings.

Q. Turn to the date of May 2, 1891. In whose handwriting is that?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. It is my handwriting.

Q. What is the amount of that entry?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. \$7,200.00.

Q. What is the effect of it?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. The effect would be to reduce the interest-paid account and increase the earnings.

201 Q. On what page is that?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. On page 127.

Q. Turn to June 20th, 1891. Do you find there a credit entry, and for how much?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. I find \$10,000.00.

Q. In whose handwriting.

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. It is mine.

Q. Is it correctly entered by you?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Yes, sir.

Q. And what is the effect of it?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. The effect would be to decrease the interest-paid account and increase the earnings of the bank.

Q. What page is that on?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Page 131.

Q. You may look at Cash Journal E under date of June 30th, 1891, and see if you had a credit there for \$3,000.00.

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Yes, sir.

Q. In whose handwriting?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. It is mine.

Q. Is it correctly entered?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

202 A. Yes, sir.

Q. And what would be the effect of that credit of \$3,000.00?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. That would be just the same as the others to decrease the interest-paid account and increase the apparent earnings.

Q. Turn to September 25, 1891, in the interest-paid account book. Do you find a credit item of \$14,000.00?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Yes, sir; I find it here.

Q. Is that in pencil or ink?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. That is in pencil.

Q. In whose handwriting is that?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. It is my handwriting. Those are my figures, I think.

Q. Is the entry correct?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

Q. And what is the effect of that entry?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. It would be to decrease the interest-paid account and add to the earnings of the bank.

Q. Turn to December 31, 1891, Journal F, page 278?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. I have the book.

Q. What do you find there?

203 Respondents object as incompetent, irrelevant and immaterial, not the best evidence.

A. I find an entry here \$15,000.00, interest-paid account.

Q. In whose handwriting is it?

Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. It is my handwriting.

Q. Is it correctly entered?

Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, sir.

Q. And what is the effect of that entry?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. The effect of that would be just the same as the others, to decrease the interest-paid account and add to the earnings of the bank.

Q. You may turn to the interest-paid account book to the date of February 2, 1892. Do you find there an entry of \$2,103.44 credit?

Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, sir.

Q. In whose handwriting?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. That is mine.

Q. What is the effect of that entry?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. To reduce the account and add to the earnings of the bank.

Q. Turn to the entry of May 4th, 1892. Do you find there a credit of \$5,000.00?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

204 Q. Whose handwriting?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

Q. Is that correctly entered?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

Q. What is the effect of that entry?

Respondents object as incompetent, irrelevant, and immaterial and not the best evidence.

A. The effect would be to reduce the interest-paid account and increase the earnings of the bank.

Q. Mr. Hayden, all of these entries in the interest-paid account and in the journal were credits, were they?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

Q. And were made from slips which were handed you?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Made from slips handed me, yes, sir.

Q. And the effect of all of them would be to increase the apparent earnings of the bank and decrease the interest-paid account?

Respondents object as incompetent, irrelevant, immaterial and not the best evidence.

A. Yes, sir.

Respondents move to strike out each and all of the answers of the witness as to entries made in the books from which he has been testifying, on the ground that no proper foundation has been laid for the same, and that the testimony is incompetent, irrelevant and immaterial, as the same appear not to be the original entries of the transactions.

205-225 Q. Is that book which you have before you a book of original entry?

Respondents object as leading, incompetent and immaterial.

A. Yes, sir.

Q. The book you now refer to is the interest-paid account?

A. The interest-paid account, yes, sir.

* * * * *

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EXHIBIT 11.

Date of note.	Amount.	Date discounted.	No.
Oct. 2, 1889....	\$5,000	Sept. 30, 1889.....	74006
Apr. 7, 1890.....	5,000	Apr. 7, 1890.....	80065
Aug. 6, 1890....	5,000	Aug. 7, ".....	92000
" 6, ".....	5,000	" 7, ".....	92001
" 6, ".....	5,000	" 7, ".....	92002
" 6, ".....	5,000	" 7, ".....	92003
" 6, ".....	5,000	" 7, ".....	92004
" 28, ".....	5,000	" 28, ".....	93000
" 28, ".....	5,000	" 28, ".....	93001
" 28, ".....	5,000	" 28, ".....	93002
" 28, ".....	5,000	Oct. 2, ".....	93030
Feb. 9, 1891.....	5,000	Feb. 10, 1891.....	98011
" 9, ".....	5,000	" 10, ".....	98012
" 9, ".....	5,000	" 14, ".....	98013
" 16, ".....	5,000	" 16, ".....	95139

Date of note.	Amount.	Date discounted.	No.
M'ch 3, 1891.....	5,000	M'ch 11, 1891.....	96093
" 4, "	5,000	" 11, "	96094
Apr. 11, "	5,000	Apr. 13, "	98030
" 20, "	5,000	May 9, "	100,117
May 2, "	5,000	" 9, "	101,012
" 15, "	5,000	June 2, "	98161
June 2, "	5,000	" 3, "	99022
" 5, "	5,000	" 5, "	99068
Aug. 8, "	5,000	Aug. 8, "	101,104
" 14, "	5,000	" 18, "	102,053
" 27, "	5,000	" 27, "	112,005
" 28, "	5,000	" 28, "	101,194
" 28, "	5,000	" 28, "	113,000
Sept. 2, "	5,000	Sept. 2, "	102,063
" 17, "	5,000	" 17, "	102,093
Oct. 5, "	5,000	Oct. 7, "	112,013
" 24, "	5,000	" 26, "	112,016
" 29, "	5,000	" 29, "	111,187
Nov. 2, "	5,000	Nov. 4, "	113,007
May 2, "	5,000	" 5, "	101,292
Nov. 7, "	2,500	" 7, "	102,173
" 9, "	2,500	" 7, "	111,208
Aug. 27, "	5,000	" 12, "	112,054
Nov. 17, "	5,000	" 19, "	112,072
" 23, "	5,000	" 28, "	112,112
Dec. 1, "	5,000	Dec. 1, "	113,019
" 11, "	5,000	" 11, "	113,037
" 17, "	5,000	" 11, "	114,010
Nov. 28, "	5,000	Jan. 18, 1892.....	111,328
Dec. 13, "	5,000	" 18, "	113,098
Jan. 19, 1892.....	5,000	" 18, "	114,068
" 18, "	5,000	" 18, "	117,003
" 30, "	5,000	Feb. 3, "	114,107
" 30, "	5,000	" 5, "	115,033
Feb. 6, "	5,000	" 5, "	116,008
" 10, "	5,000	" 11, "	117,005
" 10, "	5,000	" 11, "	118,000
" 10, "	5,000	" 11, "	118,001
" 3, "	5,000	" 15, "	118,004
" 3, "	5,000	" 15, "	118,005
" 17, "	5,000	" 16, "	115,069
" 10, "	5,000	" 19, "	115,092
" 10, "	5,000	" 19, "	116,012
M'ch 3, "	5,000	M'ch 3, "	119,000
227			
M'ch 3, 1892.....	5,000	M'ch 3, 1892.....	119,001
" 3, "	5,000	" 3, "	119,002
" 3, "	5,000	" 3, "	119,003
" 3, "	5,000	" 3, "	119,004

Date of note.	Amount.	Date discounted.	No.
Feb. 24, 1892.....	5,000	M'ch 4, 1892.....	115,124
" 27, "	5,000	" 4, "	115,125
M'ch 2, "	5,000	" 4, "	116,025
" 3, "	5,000	" 4, "	116,026
" 7, "	5,000	" 7, "	119,007
Feb. 29, "	5,000	" 12, "	119,010
M'ch 3, "	5,000	" 16, "	119,016
" 19, "	5,000	" 26, "	119,018
" 13, "	5,000	" 31, "	116,100
" 5, "	5,000	Apr. 9, "	116,111
" 3, "	5,000	" 18, "	116,116
" 15, "	5,000	Apr. 18, "	116,117
" 20, "	5,000	" 26, "	120,008
May 13, "	5,000	June 13, "	118,128
" 20, "	5,000	" 13, "	118,129
" 27, "	5,000	" 13, "	118,130
" 30, "	5,000	" 13, "	118,131
June 9, "	5,000	" 13, "	119,048
" 13, "	5,000	" 13, "	119,049
" 13, "	5,000	" 13, "	119,950
" 4, "	5,000	" 16, "	122,002
" 17, "	5,000	" 18, "	120,017
" 17, "	5,000	" 18, "	120,018
" 17, "	5,000	" 18, "	120,019
" 17, "	5,000	" 18, "	122,003
" 17, "	5,000	" 18, "	122,004
" 17, "	5,000	" 18, "	122,005
July 25, "	5,000	July 26, "	131,010
" 25, "	5,000	" 26, "	131,011
June 17, "	5,000	" 30, "	122,016
" 17, "	5,000	Aug. 24, "	120,165
" 17, "	5,000	" 24, "	122,018
Jan'y 18, "	5,000	" 30, "	117,189
Feb. 3, "	5,000	" 30, "	118,193
" 3, "	5,000	" 30, "	118,194
May 13, "	5,000	" 30, "	118,195
Feb. 10, "	5,000	" 30, "	118,196
May 20, "	5,000	" 30, "	118,197
" 27, "	5,000	" 30, "	118,198
" 30, "	5,000	" 30, "	118,199
June 9, "	5,000	" 30, "	119,169
M'ch 3, "	5,000	" 30, "	119,170
June 13, "	5,000	" 30, "	119,171
" 17, "	5,000	" 30, "	120,172
Sept. 6, "	5,000	Sept. 9, "	133,000
Feb. 29, "	5,000	" 15, "	119,174
M'ch 3, "	5,000	" 15, "	119,175
Sept. 22, "	5,000	" 15, "	133,001
" 25, "	5,000	" 15, "	133,002
July 21, "	5,000	" 20, "	131,017

Date of note.	Amount.	Date discounted.	No.
Sept. 1, 1892.....	5,000	Sept. 20, 1892... ..	133,003
" 6, "	5,000	" 20, "	133,004
" 14, "	5,000	" 30, "	122,097
M'ch 19, "	5,000	Oct. 3, "	119,177
" 24, "	5,000	" 3, "	119,178
Sept. 22, "	5,000	" 10, "	133,009
Oct. 1, "	5,000	" 17, "	132,008
228			
Aug. 6, 1892.....	5,000	Oct. 17, 1892... ..	132,009
" 14, "	5,000	" 17, "	132,010
Oct. 1, "	5,000	" 17, "	134,002
" 1, "	5,000	" 17, "	134,003
" 15, "	5,000	" 17, "	134,004
" 15, "	5,000	" 17, "	134,005
" 20, "	5,000	" 19, "	132,012
Sept. 6, "	5,000	" 19, "	133,011
" 10, "	5,000	" 19, "	133,012
" 14, "	5,000	" 19, "	133,013
" 22, "	5,000	" 19, "	133,014
" 27, "	5,000	" 19, "	133,015
April 19, "	5,000	" 26, "	120,206
Oct. 22, "	5,000	" 27, "	134,013
Nov. 26, "	5,000	Nov. 30, "	125,005
Dec. 19, "	5,000	Dec. 9, "	136,000
" 8, "	5,000	" 10, "	136,001
" 8, "	5,000	" 10, "	136,002
" 8, "	5,000	" 10, "	136,003
" 16, "	5,000	" 30, "	136,006
Jan. 3, 1893.....	5,000	Jan. 5, 1893.....	134,038
" 5, "	5,000	" 5, "	134,039
" 5, "	5,000	" 5, "	134,040
Dec. 19, 1892.....	5,000	" 5, "	136,008
Jan. 3, 1893.....	5,000	" 5, "	137,001
" 3, "	5,000	" 5, "	137,002
Dec. 2, 1892.....	5,000	" 6, "	136,010
Jan. 21, 1893.....	5,000	" 21, "	137,003
Total.....	\$735,000		

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EXHIBIT 16.

From interest-paid book.

Cr. 12/29.

\$813.00.

(Page 6.)

EXHIBIT 17.

14. Cr. of \$2,500.00.

(Page 55.)

EXHIBIT 18.

From interest-paid a/c.	Page 58.
1888.	
Cr. June 9.	1,500

EXHIBIT 19.

From interest-paid a/c.	Page 65.
1888.	
Nov. 16. Cr. error.	\$2,500.

EXHIBIT 20.

From interest-paid a/c.	Page 83.
1889.	
(Sep.) 30. By costs real est.	7,000.

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EXHIBIT 21.

From interest-paid a/c.	Page 95.
1890.	
M'ch	
19. Cr.	5,000.00.

EXHIBIT 22.

From interest-paid a/c.	Page 98.
1890.	
May.	
Credit N. Y.	1,500.

EXHIBIT 22½.

From interest-paid a/c.	Page 99.
1890.	
June	
3. Credit real est.	\$2,500.

EXHIBIT 23.

From interest-paid a/c.	Page 98.
1890.	
May	
19. Credit Chic.	\$2,000.

EXHIBIT 24.

From interest-paid a/c.	Page 98.
1890.	
May	
21. Credit N. Y.	\$1,500.

EXHIBIT 25.

From interest-paid a/c.	Page 108.
1890.	
Sep. 24.	
Cr. by real-estate a/c.	5,000.

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EXHIBIT 26.

From interest-paid a/c. 1890. Dec. 27. Cr. S. & B. a/c.	Page 115. 10,000.
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EXHIBIT 27.

From interest-paid a/c. 1891. Ap'l. Cr. pris. cont.	Page 125 800.
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EXHIBIT 28.

From interest-paid a/c. 1891. May. Credit.	Page 127. 7,200.
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EXHIBIT 29.

From interest-paid a/c. June, 1891. 20. Cr. by	Page 131. 10,000.
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EXHIBIT 30.

From interest-paid a/c. 1891. Sep. 25. Credit.	Page 140. 14,000.
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EXHIBIT 31.

From Journal F. 612, interest paid.	Page 278. 15,000.
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EXHIBIT 32.

From interest-paid a/c. 1892. Feb'y 2. "To bal."	Page 151. 2,103.44
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EXHIBIT 33.

From interest-paid a/c. 1892. May 4. Credit by York.	Page 158. 5,000.
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EXHIBIT 34.

Undivided profits, December 31, 1884:

Interest-paid account.....	6,874.24
Wages.....	4,849.62
Expenses.....	3,953.11
	<hr/>
	15,676.97
Discount, interest & exchange.....	31,956.85
	<hr/>
Net profit.....	16,279.88
Declared dividend.....	15,000.
Credited surplus.....	2,000.
Net profits reported.....	17,092.88

Fictitious credit to interest-paid acc't:

December 29, 1884	813.
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Undivided profits, June 30, 1885:

Interest-paid account.....	4,671.46
Wages.....	4,209.96
Expenses.....	4,277.63
	<hr/>
	13,159.05

Discount, interest & exchange.....	28,451.97
Undivided profits bro't forw'd	92.88
	<hr/>
	28,544.85

Net profits.....	15,385.80
Declared dividend.....	13,000.
Credited surplus.....	2,000.

233 Undivided profits, December 31, 1885:

Interest-paid account....	9,818.00
Wages.....	4,395.96
Expenses.....	3,581.50
	<hr/>
	17,795.46

Discount, interest & exchange... ..	35,693.37
Undivided profits bro't forw'd.....	385.80
	<hr/>
	36,079.17

Net profits... ..	18,283.71
Declared dividend....	16,000.
Credited surplus.....	2,000.

Undivided profits, June 30, 1886:

Interest-paid account.....	9,528.89
Wages.....	4,941.48
Expenses	6,238.34
	<hr/>
	20,708.71

Discount, interest & exchange.....	36,434.36	
Undivided profits bro't forw'd.....	283.71	
		<u>36,718.07</u>

Net profits	16,009.36
Declared dividend.....	14,000.
Credited surplus.....	2,000.

Undivided profits, December 31, 1886 :

Interest-paid account.....	8,417.96
Wages.....	5,149.98
Expenses.....	3,773.83

17,341.77

Discount, interest & exchange.....	37,601.08	
Undivided profits bro't forw'd.....	9.36	
		<u>37,610.44</u>

Net profits.....	20,268.67
Declared dividends.....	18,000.
Credited surplus.....	2,000.

234 Undivided profits, June 30, 1887 :

Interest-paid account.....	7,333.23
Wages....	6,179.15
Expenses.....	6,672.75

20,185 13

Discount, interest & exchange.....	39,946.64	
Undivided profits bro't forw'd.....	268.67	
		<u>40,215.31</u>

Net profits.....	20,030.18
Declared dividend.....	18,000.
Credited surplus.....	2,000.

Undivided profits, December 31, 1887 :

Interest-paid account.....	13,204.38
Wages.....	5,407.35
Expenses	4,064.60

22,676.33

Discount, interest & exchange.....	42,700.74	
Undivided profits bro't forw'd.....	30.18	
		<u>42,730.92</u>

Net profits... ..	20,054.59
Declared dividend.....	18,000.
Credited surplus.....	2,000.

235 Undivided Profits, June 30, 1888:

Interest paid-account.....	9,728.95
Wages.....	6,653.28
Expenses.....	6,678.13

23,060.36

Discount, interest & exchange..... 38,240.90

Undivided profits bro't forw'd... 54.59

38,295.49

Net profits..... 15,235.13

Declared dividend..... 18,000.

Credited surplus..... 2,000.

Net profits reported..... 20,305.12

Fictitious credits to interest-paid acc't:

April 14, 1888..... 2,500.

June 9, 1888... 1,500.

Part of wages... 1,069.99

Total.... 5,069.99

Undivided profits, December 31, 1888:

Interest-paid account..... 13,249.88

Wages... 7,769.93

Expenses... 2,990.27

24,010.08

Discount, interest & exchange... 42,082.82

Undivided profits bro't forw'd..... 305.12

42,387.94

Net profits..... 18,377.86

Declared dividend..... 18,000.

Credited surplus... 2,000.

Net profits reported..... 20,877.86

Fictitious credit to interest-paid acc't:

November 16, 1888... 2,500.

236 Undivided profits, June 30, 1889:

Interest-paid account..... 18,940.94

Wages..... 6,811.64

Expenses... 6,297.79

32,050.37

Discount, interest & exchange..... 39,770.89

Undivided profits bro't forw'd..... 877.86

40,648.75

Net profits..... 8,598.38

Declared dividend..... 18,000.

Credited surplus..... 2,000.

Net profits reported..... 20,598.38

Fictitious credit to interest-paid acc't:

June 28, 1889.....	10,000.	
Part of expenses.....	2,000.	
		<u>12,000.</u>
Undivided profits, December 31, 1889:		
Interest-paid account.....		17,223.91
Wages.....		6,699.98
Expenses.....		<u>4,383.46</u>
		28,307.35
Discount, interest & exchange.....	38,807.51	
Undivided profits bro't forw'd.....	598.38	
		<u>39,405.89</u>
Net profits.....		11,098.54
Declared dividend.....		15,000.
Credited surplus.....		2,000.
Net profits reported.....		18,098.54

Fictitious credit to interest-paid acc't:

September 30, 1889.....		7,000.
237 Undivided profits, June 30, 1890:		
Interest-paid account.....		19,952.81
Wages.....		6,824.98
Expenses.....		<u>4,072.32</u>
Taxes.....		2,000.
		32,850.11
Discount, interest & exchange.....	34,721.76	
Undivided profits bro't forw'd.....	1,098.54	
		<u>35,850.30</u>
Net profits.....		3,000.19
Declared dividend.....		15,000.
Credited surplus.....		2,000.
Net profits reported.....		17,500.19

Fictitious credit to interest-paid acc't:

March 19, 1890.....	5,000.	
May 16, 1890.....	1,500.	
May 19, 1890.....	2,000.	
May 21, 1890.....	1,500.	
June 3, 1890.....	2,500.	
Taxes not charged off.....	2,000.	
		<u>14,500.00</u>
Undivided profits, December 31, 1890:		
Interest-paid account.....		22,694.74
Wages.....		6,750.23
Expenses.....		<u>2,543.66</u>
Taxes.....		2,000.
		<u>33,988.63</u>

Discount, interest & exchange....	35,650.55	
Undivided profits bro't forw'd..	500.19	
		<u>36,150.74</u>

Net profits...	2,162.11
Declared dividend.....	15,000.
Credited surplus.....	2,000.
Net profits reported.....	<u>17,162.11</u>

Fictitious credits to interest-paid acc't:

September 25, 1890.....	5,000.	
December 27, 1890.....	10,000.	
		<u>15,000.</u>

238 Undivided profits, June 30, 1891:

Interest-paid account.....	29,943.71
Wages.....	6,644.98
Expenses.....	5,198.28
	<u>41,786.97</u>

Discount, interest & exchange.....	37,878.65	
Undivided profits bro't forw'd.....	162.11	
		<u>38,040.76</u>

Net loss.....	3,746.21
Declared dividend.....	15,000.
Credited surplus.....	2,000.
Net profits reported.....	<u>17,253.79</u>

Fictitious credits to interest-paid acc't:

April 9, 1891.....	800.	
May 2, 1891.....	7,200.	
June 20, 1891.....	10,000.	
June 30, 1891.....	3,000.	
		<u>21,000.</u>

Undivided profits, December 31, 1891:

Interest-paid account.....	30,251.77
Wages.....	6,530.83
Expenses.....	4,258.23
Taxes.....	2,512.50
	<u>43,553.33</u>

Discount, interest & exchange.....	31,415.06	
Undivided profits bro't forw'd.....	253.79	
		<u>31,668.85</u>

Net loss...	11,884.48
Declared dividend.....	15,000.
Credited surplus.....	2,000.
Net profits reported.....	<u>18,128.02</u>

Fictitious credits to interest-paid acc't:

September 25, 1891.....	14,000.	
December 31, 1891.....	15,000.	
Part of taxes not ch'g'd off.....	1,012.50	
		<u>30,012.50</u>

239 Undivided profits, June 30, 1892:

Interest-paid account.....	14,258.58	
Wages.....	6,944.96	
Expenses.....	5,844.66	
Taxes.....	1,012.50	
Premium.....	621.37	
Stocks & bonds.....	4,650.	
First national bank, Fairmont.....	521.91	
F. & M. bank, Carleton.....	4,073.13	
American exchange in Europe.....	725.40	
Bills receivable—bad debts.....	16,082.02	
		<u>54,734.73</u>

Discount, interest & exchange.....	31,038.30	
Undivided profits bro't forw'd.....	1,128.02	
Suspense account.....	47.51	
Carleton collection account.....	1,425.85	
Nebraska Mfg. Company.....	121.86	
		<u>33,761.54</u>

Net loss.....	20,973.19	
Declared dividend.....	12,000.	
Credited surplus.....	2,000.	
Net profits reported.....	14,026.81	

Fictitious credits to interest-paid acc't:

February 2, 1892.....	2,103.44	
May 4, 1892.....	5,000.	
		<u>7,103.44</u>

Net loss.....	20,973.19	
Net profits reported ..	14,026.81	
		<u>35,000.00</u>

Accounted for by charge to surplus, 2, 2, '92.....	30,000.00	
Fictitious credit to interest-paid acc't 5, 14, '92....	5,000.00	
		<u>35,000.00</u>

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EXHIBIT 35.

\$100,000.00.

Capital national bank.

No. 4.

LINCOLN, NEB., Jan. 6, 1893.

State treasurer of Nebraska has deposited in this bank one hundred thousand dollars, payable to the order of himself on return of this certificate properly endorsed.

No. 28473. Not subject to check.

C. W. MOSHER, *Pr't.*

(Stamped on face: "Paid Jan. 19, 1893. Capital national bank, Lincoln, Neb.")

(Endorsed: "J. E. Hill, State treasurer. Pay C. W. Mosher, pr't, or order, for collection account of treasurer of State of Nebraska. J. S. Bartley, treasurer, Bartlett.")

EXHIBIT 36.

\$35,357.85.

Capital national bank.

No. 4.

LINCOLN, NEB., Jan. 6, 1893.

State treasurer of Nebraska has deposited in this bank thirty-five thousand three hundred & fifty-seven $\frac{85}{100}$ dollars, payable to the order of himself on return of this certificate properly endorsed,

No. 28477. Not subject to check.

C. W. MOSHER, *Pr't.*

(Stamped on face: "Paid Jan. 16, 1893. Capital national bank, Lincoln, Neb.")

(Endorsed: "J. E. Hill, State treasurer. Pay C. W. Mosher, pr't, or order, for collection account of treasurer of State of Nebraska. J. S. Bartley, treasurer, Bartlett.")

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EXHIBIT 37.

\$150,000.00.

Capital national bank.

No. 4.

LINCOLN, NEB., Jan. 6, 1893.

State treasurer of Nebraska has deposited in this bank one hundred and fifty thousand dollars, payable to the order of himself on return of this certificate properly endorsed.

No. 28471. Not subject to check.

C. W. MOSHER, *Pr't.*

(Written across face in red ink: "Copy.")

(Endorsed: "J. E. Hill, State treasurer. Pay C. W. Mosher, pr't, or order, for collection account of treasurer of State of Nebraska. J. S. Bartley, treasurer; Bartlett.")

EXHIBIT 38.

From Certificate of Deposit Register.

Date.	Deposited by—	Number.	Amount.	Time.	Date paid.
Jan'y 6	State tr.....	28471	150,000.00		
	State tr.....	72	35,357.85	1, 16
	State tr.....	73	100,000.00	1, 19

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EXHIBIT 39.

Certificates of Deposit.

The amounts of which are not correctly shown by the certificate of deposit register.

No.	Date.	Name on register.	Name on certificate.	Amount shown by register.	Amount shown by certificate.
19272	Jan. 7, '89	G. M. Bartlett.....	J. E. Hill, treas.....	\$5.00	\$100,000.00
21379	Dec. 23, '89	J. E. Hill.....	.....	100.00	50,000.00
21386	Dec. 24, '89	G. M. Bartlett, Jr.....	.....	5.00	50,000.00
23593	Dec. 9, '90	do.....	J. E. Hill, State treas.....	100.00	40,000.00
24171	May 1, '91	Costs.....	D. B. Welch.....	1.50	10,000.00
24574	May 15, '91	P. L. T. Ashton.....	.....	500.00	1,500.00
24653	June 1, '91	C. Hammond.....	.....	100.00	5,000.00
24707	June 10, '91	Jno. A. T. Hibbs.....	.....	300.00	3,000.00
24806	June 27, '91	Cassius S. Weese.....	.....	100.00	2,100.00
24866	July 8, '91	A. Humphrey.....	.....	500.00	4,500.00
24937	July 18, '91	Collections.....	J. E. Hill, treas.....	4,650.00	14,650.00
24941	July 20, '91	do.....	J. E. Hill, St. treas.....	5,000.00	10,000.00
24981	July 27, '91	A. P. S. Stuart.....	.....	20.00	2,000.00
24986	July 27, '91	H. R. Krug.....	.....	1,000.00	7,000.00
25047	Aug. 6, '91	Collections.....	J. E. Hill, treas.....	975.00	37,975.00
25056	Aug. 8, '91	do.....	Harper notes.....	1,000.00	7,000.00
25097	Aug. 17, '91	do.....	J. E. Hill, treas.....	50.00	50,000.00
25380	Oct. 3, '91	H. E. Carson.....	.....	100.00	1,100.00
25636	Nov. 18, '91	Colls.....	J. E. Hill, treas.....	100.00	50,000.00
25691	Nov. 28, '91	D. B. Welch.....	.....	100.00	10,000.00
25861	Dec. 22, '91	Colls.....	J. E. Hill, treas.....	114.75	38,114.75
25862	Dec. 22, '91	do.....	J. E. Hill, treas.....	114.75	37,114.75
25933	Jan. 2, '92	Mayer Bros.....	.....	1,000.00	11,000.00
26818	May 16, '92	Loup City costs.....	First nat'l bank, Poultney ..	3.00	5,000.00
27077	June 29, '92	C. W. M.....	L. Meyer.....	1,000.00	10,000.00
27221	July 18, '92	J. P. Kirby.....	.....	1,000.00	10,000.00
27375	Aug. 13, '92	H. R. Krug.....	.....	1,000.00	10,000.00
27401	Aug. 18, '92	Costs.....	Geo. Olcott, cashier.....	1.77	5,000.00
27978	Nov. 3, '92	Int.....	La Salle nat'l bank.....	3.00	5,000.00
28009	Nov. 7, '92	Costs.....	La Salle nat'l bank.....	3.00	5,000.00
				\$18,946.77	\$292,054.50

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EXHIBIT 40.

From Certificate of Deposit Register.

Date.	Deposited by—	Number.	Amount.	Time.	Date paid.
1891. May 1	Costs.....	24,471	1.50	.....	5, 13, '91

Interest at 6% if left 7
months. No interest
after maturity.

\$10,000.00. Capital national bank.

LINCOLN, NEB, *April 28, 1891.*

D. B. Welch has deposited in this bank ten thousand dollars, payable to the order of self on return of this certificate properly endorsed.

No. 24471. Not subject to check.

C. W. MOSHER, *Pt.*

No. 20006. Nov. 28, '91.

(Stamped on face: "Paid Nov. 28, 1891. Capital nat'l bank, Lincoln, Neb.")

(Written across face in red ink: "Copy.")

(Endorsed: "Pay R. C. Outcalt, cashier, or order for collection. Account of First National Bank of Cadiz, O. I. C. Moore, cashier.")

* * * * *

(See table marked pages 259 and 260.)

Statement Showing a Few Who Were Creditors Jan. 21st, 1893, that Were Creditors Prior to that Date.

	Jan. 10, 1888.	July 10, 1888.	Jan. 8, 1889.	July 9, 1889.	Jan. 14, 1890.	July 8, 1890.	Jan. 13, 1891.	July 14, 1891.	Jan. 12, 1892.	July 12, 1892.	Jan. 21, 1893. At suspen- sion.
Henry Gerner.....	\$3,895.52	\$2,864.37	\$1,891.37	\$2,884.49	\$883.20	\$1,827.78	\$444.02	\$1,160.96	\$1,592.22	\$1,582.74	\$1,856.01
Gettler Bros.....	2,030.01	1,785.65	3,143.62	2,421.97	1,628.54	854.14	1,938.11	1,124.10	694.35	978.30	2,168.44
Humphrey Bros. Hdwe. Co.....	951.30	1,227.32	2,086.53	513.24	1,832.64	3,051.74	371.50	860.72	1,515.30	1,733.56	885.48
E. Hallatt.....	950.64	125.24	890.63	123.59	493.23	59.83	529.	25.85	459.16	141.93	2,400.34
Chas. Hammond.....	6,066.66	6,389.86	313.75	7,509.33	890.92	1,589.05	454.50	8,962.87	5,921.88	160.49	604.03
E. Hoppe.....	4,790.03	6,894.69	7,225.24	2,409.44	3,528.27	614.26	995.29	8,995.86	1,145.29	1,129.87	1,183.51
Lincoln Land Co.....	1,561.15	9,240.56	2,636.54	5,580.99	682.01	6,603.81	1,121.14	1,817.70	1,313.68	26,096.32	6,197.19
Fred Schmidt.....	595.69	1,554.90	564.95	510.09	114.09	2,158.91	1,904.19	340.18	1,819.45	3,464.28	3,077.05
Schroeder and Beckman.....	183.29	1,984.80	2,740.32	3,997.69	2,255.07	4,344.18	5,651.99	3,247.95	2,708.77	3,872.92	6,383.32
Wittmann Bros.....	1,782.16	2,588.40	2,813.39	3,159.85	2,757.67	34.04	630.70	191.63	840.07	731.84	1,144.82
Stull Bros.....	1,217.14	1,255.39	6,097.52	9,217.77	5,564.54	364.19	4,737.16	2,352.88	7,672.14	1,443.24	2,375.01
R. M. Turner.....	333.95	344.18	137.94	360.32	295.43	212.37	792.44	610.18	681.90	107.07	3,825.79
Thos. H. Benton.....	23,476.49	16,797.34	17,474.29	28,462.99	4,900.	46,066.26	37,545.38	10,278.35	18,373.14	18,503.80	3,670.13
County Treas.....								17,942.29	605.	1,477.98	39,660.62
Wm. Beckman.....								85.			462.48
Armour, Cudahy & Co., succeeded } by Cudahy Packing Co.,..... }					9-2.05	7,506.63	1,249.85	1,474.75	1,760.10	937.21	1,182.38
J. A. Campbell and Son.....									1,692.38	1,472.45	3,603.59
C. W. Cockrell, succeeded by Cock- } rell Bros..... }									26,447.68	7,945.81	3,118.67
Dorr Bros.....	892.22	1,874.49	5,296.92	630.71	1,519.25	573.59	2,242.59	2,128.41	1,197.96	1,685.23	812.73
A. M. Davis & Son.....								470.65	2,510.70	9,383.49	528.66
City Treas.....	8,772.77	15,693.93	12,634.37	14,985.46	17,912.33	14,849.13	22,253.79	7,880.52	20,575.35	14,239.23	21,560.39

298 J. A. CRUMTON recalled.

Questioned by Mr. LAMBERTSON:

Q. Mr. Crumpton, you were a book-keeper in the Capital national bank?

A. Yes, sir.

Q. And how long were you connected with it prior to its failure?

A. I was there five years and a half before the failure.

Q. Are you familiar with the different books kept in the bank?

A. Yes, sir.

Q. And have you been employed either by the examiner or the receiver since the bank failed?

A. Yes, sir.

Respondents object to the taking of any testimony of this witness for the reason that his name does not appear in the notice under which this testimony is purported to be taken.

A. (continued). I was employed first by the examiner, after the failure of the bank, and then by the two receivers.

Q. And were these books, the books to which the attention of Mr. Outcalt has been directed, were they in the bank at the date of its failure?

Respondents object as incompetent, irrelevant and immaterial, and no proper foundation laid.

A. Yes, sir.

Q. And were they delivered to the bank examiner, Mr. Griffith?

Respondents object as incompetent, irrelevant and immaterial, and having no proper foundation laid.

A. Yes, sir.

299 Q. And were they by him delivered to Mr. Macfarland?

Respondents object as incompetent, irrelevant and immaterial, and having no proper foundation laid.

A. Yes, sir.

Q. And were they delivered by Mr. Macfarland to the present receiver?

Respondents object as incompetent, irrelevant and immaterial, and having no proper foundation laid.

A. Yes, sir.

Q. You heard the testimony of Mr. Outcalt?

A. Yes, sir.

Q. Did you recognize all the books to which his attention was directed as the books and records of the Capital national bank?

Respondents object as incompetent, irrelevant and immaterial, leading, not the best evidence, and having no proper foundation laid.

A. Yes, sir; every one of them.

Q. You have heard the testimony of Mr. Hayden, which he gave in this case?

A. Yes, sir.

Q. Were those the books to which his attention was called at the time of his examination?

Respondents object as immaterial.

A. Yes, sir.

Q. Are they the books from which the statements and tabulated data to which his testimony referred were taken?

Respondents object as incompetent and immaterial, having no proper foundation laid.

A. They were the books from which the exhibits were made. The tabulated statements also included some other books which are not here, but were books of the bank.

Q. What particular books of the bank did you keep?

A. I kept the individual balance book.

300 Q. Have you that there?

A. Yes, sir.

Q. What is the title of it?

A. Balance Book, November and December, 1889, Number 2.

Q. And what entries were made in that book?

Respondents object as incompetent and not the best evidence.

A. The accounts of individuals who kept deposits with the Capital national bank.

Q. Is it a book of original entry?

A. Yes, sir.

Q. And when were the entries made in that book?

Respondents object as incompetent, irrelevant and immaterial.

A. From day to day as the transactions occurred.

Q. And are they correctly entered and accurately set down in the book?

Respondents object as incompetent, irrelevant and immaterial and as leading.

A. Yes, sir.

Q. And the account, so far as you kept it, is correct?

Respondents object as incompetent, irrelevant, immaterial and leading.

A. Yes, sir.

Q. Some of the clerks who kept these books are out of the State, are they not?

Respondents object as incompetent, irrelevant and immaterial, and as having no proper foundation laid.

A. They are out of the city, and I think one of them is out of the State.

Q. Who is that?

A. I think Winslow is out of the State.

Q. What book did he keep?

A. He kept one of the individual balance books.

Q. After the time you came into the bank?

A. He kept one. Two of these books were kept. He kept one of them and I kept the other.

301 Q. I now call your attention to this book called Journal 5.

You may state whether you recognize and identify that as one of the books of the bank during the time you were there?

Respondents object as incompetent, irrelevant and immaterial, not the best evidence, and as having no proper foundation laid.

A. This was one of the books in the bank prior to the failure.

Q. Who kept that book?

A. Hal Young.

Q. Was it in the bank at the time of the failure?

A. Yes, sir.

Q. What entries were made in that book?

Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. Bills discounted.

Q. What period of time does that book cover?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. March 25th, 1892, to the failure of the bank, January 21st, 1893.

Q. Give the first item in the book.

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Page number 2, March 25, 1892, No. 113,071, \$100.00.

Q. I now call your attention to a book, you may give the name of it?

A. Certificate of deposit register.

Q. Do you recognize and identify that as one of the books of the bank when you were there?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence, no foundation laid.

A. Yes, sir.

302 Q. Before the failure of the bank?

A. Yes, sir.

Q. What entries are made in that book?

A. The certificates of deposit issued by the bank.

Q. What period of time does it cover?

Respondents object as incompetent, irrelevant and immaterial, having no proper foundation laid, and not the best evidence.

A. From May 23d, 1887, to February 29th, 1892.

Q. Who kept that book at the date of the failure of the bank?

A. H. H. Simonds.

Q. Where does he reside now?

A. He resides in Lincoln.

Q. I call your attention to another book. Please give the title to the examiner.

A. Certificate of deposit register.

Q. Do you recognize and identify that book as one of the books of the Capital national bank at the time you were there, before the failure of the bank?

Respondents object as incompetent, irrelevant and immaterial, having no proper foundation laid, and not the best evidence.

A. I do.

Q. What entries are made in that book?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. A record of the certificates of deposit.

Q. Who kept that book?

A. Mr. Simonds.

Q. During what period of time does that book cover?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. January 3d, 1893, to January 21st, 1893.

Q. It just covers and includes those two periods of time, does it?

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Yes, sir.

303 Q. I hand you another book. Give the title of it to the examiner.

A. Certificate of deposit register.

Q. What entries are put in that book?

Respondents object as not the best evidence, incompetent, and as having no proper foundation laid.

A. A record of the certificates of deposit.

Q. What period does it cover?

Respondents object as incompetent, not the best evidence, and having no proper foundation laid.

A. From December 1st, 1892, to December 31, 1892.

Q. Do you recognize and identify that as one of the books of the bank at the time you were there, and before the failure of the bank?

Respondents object as incompetent, irrelevant and immaterial, not the best evidence, and as having no proper foundation laid.

A. I do.

Q. Now, as to these books which you have identified, and the

other books to which and all of which Mr. Outcalt has testified, you may state whether these are books of original entry?

Respondents object as having no proper foundation laid and as incompetent.

A. Why, most of those are books of original entry.

Q. Well, what ones are not books of original entry?

A. This book, Journal 5, was made up from the original slips or entries.

Q. It is a book of original entry then?

A. Yes, sir.

Q. Does not that make it a book of original entry?

Respondents object as leading.

A. Yes, sir.

304-306 Q. There is no other book from which Journal 5 or any of these other books are taken?

Respondents object as leading.

A. No, sir, there was not.

Q. Now, the only other entries that were made were those that were entered upon slips of paper?

A. Yes, sir.

Q. But those are really the only books that were kept in the bank?

Respondents object as leading.

A. Yes, sir.

Q. Now, were those books to which your attention has been directed, and the testimony of Mr. Outcalt has been directed, were those kept in the usual course of business from day to day?

Respondents object as incompetent, irrelevant and immaterial and having no foundation laid, and not being the best evidence.

A. Yes, sir.

Q. Do they contain the transactions of the bank as they occurred and were done from day to day?

Respondents object as incompetent, irrelevant and immaterial, having no proper foundation laid, and not the best evidence.

A. Yes, sir.

Q. These are the books from which the tabulated statements in Mr. Hayden's testimony in this case have been taken?

A. Yes, sir.

Q. You heard his testimony, did you not?

A. Yes, sir.

Q. And you prepared some of those statements at his request?

A. Yes, sir.

Q. And you took them from these books?

Respondents object as incompetent and immaterial, and not the best evidence.

A. Yes, sir.

* * * * *

307 M. H. SIMONDS, of lawful age, being by me first duly cautioned, examined and solemnly sworn, deposes and says as follows, viz:

Questioned by Mr. LAMBERTSON:

Respondents object to the taking of the testimony of this witness, for the reason that the complainant is purporting to take testimony under and in accordance with a notice naming certain persons as witnesses, whose testimony will be taken, and the name of this witness is not given in said notice.

- 308 Q. You reside in the city of Lincoln?
 A. Yes, sir.
 Q. How many years have you resided here?
 A. Nine years.
 Q. What is your present business?
 A. Book-keeper in the Columbia national.
 Q. Were you employed in the Capital national bank at the date of its failure?
 A. Yes, sir.
 Q. In what position?
 A. Assistant teller.
 Q. How long had you been there?
 A. In that position?
 Q. Yes.
 A. About two years.
 Q. What books, if any, did you keep in the Capital national bank?
 A. The certificate of deposit register and the teller's book.
 Q. I hand you what purports to be a certificate of deposit register and ask you if that is one of the books you kept?

Respondents object as incompetent, irrelevant and immaterial, and to the question in that form as assuming a state of facts not proven.

A. Yes, sir.

Q. State whether you recognize and identify that book as one of the books of the Capital national bank in use when you were there?

Respondents object as incompetent, irrelevant and immaterial.

A. I do.

Q. What period of time is covered in that book?

Respondents object as not the best evidence.

Q. (Continuing :) So far as it was kept by you?

A. From June 3, 1891, to February 29, 1892.

Q. What items are entered in that book?

309 Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. Certificates of deposit are entered from the stubs. Not from the certificate itself.

Q. Are there any other entries in that book?

Respondents object as not the best evidence.

A. Nothing but certificates.

Q. Was the payment entered in that book when a certificate was paid?

A. When a certificate was paid, yes, sir.

Q. How were those entered? According to numbers and dates?

Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. According to the numbers and dates on the stub, yes, sir.

Q. As certificates were paid was any notation of that fact made on the margin?

Respondents object as leading and not the best evidence.

A. On this book, yes, sir.

Q. I now hand you another book entitled Certificate of Deposit Register, and you may state whether or not that was in use in the bank while you were there, and whether it was kept by you.

Respondents object as incompetent, irrelevant and immaterial, and having no proper foundation laid.

A. Yes, sir.

Q. What period of time does it cover?

Respondents object as not the best evidence.

A. January 3d, 1892, to January 21st, 1893.

Q. Is that similar in all respects to the other?

310 Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, sir.

Q. The same entries?

Respondents object as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, sir.

Q. I hand you another book what purports to be a certificate of deposit register. What period of time does that cover?

Respondents object as incompetent, irrelevant and immaterial, not the best evidence, and as having no proper foundation laid.

A. March 1st, 1892, to December 31, 1892, inclusive.

Q. Were the entries that are made in that book and in these three books to which you have testified, similar?

Respondents object as not the best evidence and as having no proper foundation laid.

A. Yes, sir.

Q. Were they entered from the stubs of certificates that were issued by the bank?

A. Yes, sir.

Q. Now you may state whether these books contain the record of daily transactions?

A. They do in regard to the certificates.

Q. And when were they entered?

Respondents object as incompetent, irrelevant and immaterial and having no proper foundation laid.

A. They were generally entered at the close of business of each day.

Q. Are these the books of original entry?

Respondents object as incompetent, irrelevant and immaterial and having no proper foundation laid.

A. Yes, sir.

311 Q. And the entries were made from the stubs of the certificates?

Respondents object as incompetent, irrelevant and immaterial and having no proper foundation laid.

A. Yes, sir.

Q. Are the entries in the books correct so far as the entries made by you are concerned?

Respondents object as incompetent, irrelevant and immaterial, having no proper foundation laid and not the best evidence.

A. Yes, sir.

Q. Are any of the entries made in either of these books by any one else besides yourself, of payments or otherwise?

A. Entries are made by some one else in two of these books.

Q. There are some entries made by some one else in two of them?

A. Yes, sir; that is, dates of certificates paid.

Q. In whose handwriting are those entries?

A. Here is one marked paid by C. W. Mosher, No. 25013; another one, 25047, is marked paid by Mr. Mosher.

Q. In whose handwriting is the record of 25097?

A. That is my handwriting.

Q. Who is that certificate issued to?

Respondents object as not the best evidence.

A. According to the record here it was issued to collections.

Q. How much?

Respondents object as not the best evidence.

A. \$50.00.

Q. Do you know how much it was issued for in fact?

Respondents object as immaterial and not the best evidence.

A. I could not tell from the margin of the book here.

312 Q. I hand to you certificate No. 25097, of date of Aug. 17, 1891, issued to J. E. Hill, treasurer, for \$50,000 signed by C. W. Mosher, president, and paid January 6, 1893, and I ask you how it comes to be entered in the book \$50.00?

Respondents object to the question in the form it is propounded as assuming a state of facts not proven, and as incompetent, irrelevant and immaterial, having no foundation laid and not the best evidence.

A. The only reason I can give is that the stub of the certificate calls for \$50.00.

Q. Did you ever see the certificate itself?

A. Not that I remember of. I might have seen it.

Q. Is it marked paid?

Respondents object as not the best evidence.

A. Yes, sir.

Q. Who wrote the mark paid?

Respondents object as incompetent, irrelevant and immaterial and having no foundation laid.

A. I am not certain.

Q. What entry is made in the book?

Respondents object as not the best evidence.

A. It shows the date the certificate was made, and the amount of it from the stub.

Q. Did you ever see the certificate itself before?

A. Not that I remember of.

Q. If you did, how did you come to enter it there for \$50 when it was for \$50,000?

A. I entered from the stubs of the certificates book and not from the certificate itself.

Q. Did Mr. Mosher tell you to enter it for \$50?

Respondents object as immaterial.

A. No, sir; Mr. Mosher never mentioned it to me.

Q. What is the amount entered in the certificate of deposit register for No. 25861?

313 Respondents object as not the best evidence.

A. \$114.75.

Q. I hand you certificate No. 25861, marked paid December 23, 1891, for \$38,114.75, and I ask you how it came to be entered in the book for a different amount.

Respondents object as not the best evidence, and having no foundation laid, and the question in its present form is objected to as assuming a state of facts not proven.

A. The certificate was entered in the book for the correct amount in the first place and has been erased—the 38 thousand has been erased.

Q. Did you erase it?

A. No, sir.

Q. When did you first learn it had been erased?

A. After the bank failed.

Q. Do you know who erased it?

A. According to the handwriting here Mr. Mosher probably did. It is marked paid.

Q. I hand you certificate 25862, for \$37,114.75, paid December 13, 1892, and ask you for what amount that is entered?

Respondents object as incompetent, irrelevant and immaterial, assuming a state of facts not proven and as having no foundation laid.

A. \$114.75 is the amount entered.

Q. How does it come to be entered for an amount different from the face of the certificate?

Respondents object to the question in this form as assuming a state of facts not proven, and as not the best evidence.

A. It was originally entered for the correct amount, \$37,114.75, and the 37 thousand has been erased.

Q. Do you know who erased that?

A. No, sir, I do not.

Q. Did you discover that fact before the failure of the bank?

A. No, sir.

Q. Did you erase it?

A. No, sir.

314-316 Q. Did you know that anybody erased it?

A. No, sir.

Q. Did you know of any erasures in this book prior to the failure of the bank?

A. No, sir.

Q. You never discovered any of these erasures until after the failure of the bank?

A. No, sir; I did not discover any of them.

Q. Did Mr. Mosher sometimes make entries in these books?

A. As far as marking them paid—marking them off, he did. He marked them when they were paid. He run a line through the amount and marked it paid in the column.

Q. When were these entries of payments made? About what time? When the bank examiner came around?

A. About every time the bank examiner came around.

Q. What did you do then?

A. I had to make a list out for the bank examiner to see that the account balanced in this book here, the whole account, and Mr. Mosher would mark them while I called out the certificate amount.

Q. Who would make out the list for the bank examiner?

A. He would make out part of it, according to the amounts called

off by me, and I made out part of it according to the amounts called off to me by Mr. Mosher.

Q. What would you call off to him? From that?

A. From what I called off to him from the books, yes, sir.

Q. With the exceptions of those erasures in the book, the payments, in the handwriting of Mr. Mosher, are the books correctly and accurately kept?

Respondents object as incompetent, irrelevant and immaterial.

A. As far as I know, yes, sir.

* * * * *

317 K. K. HAYDEN recalled.

Questioned by Mr. LAMBERTSON:

Q. Mr. Hayden, you have heard the testimony of Hal Young in this case?

A. Yes, sir.

Q. Also of M. H. Simons?

A. Yes, sir.

Q. Also the testimony of S. K. Hale?

A. Yes, sir.

Q. Also of J. A. Crumpton?

A. Yes, sir.

Q. Also of Mr. Macfarland, the former receiver?

A. Yes, sir.

Q. Have you been present when the books presented to them have been identified as the books in use in the Capital national bank prior to the date of its failure?

A. Yes, sir.

Q. Are those some of the books that were delivered to you by your predecessor in office, J. D. Macfarland?

Respondents object as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. And are these books now in your custody, and were they in your custody as receiver of the Capital national bank when you gave your testimony before in this case?

Respondents object as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. And do these books purport to give the history and contain the different transactions of business of the Capital national bank during its history?

Respondents object as incompetent, irrelevant and immaterial, and having no proper foundation laid.

A. Yes, sir.

Q. You have examined them more or less and are familiar with the contents of those books, are you not?

Respondents object as incompetent, irrelevant and immaterial and having no proper foundation laid.

A. Yes, sir.

Q. And they purport upon their face to be the books of original entry, containing accounts of all the transactions and business of the bank, and entered as of the date when the different transactions of the bank occurred?

Respondents object as leading, incompetent, irrelevant and immaterial, not the best evidence, and as assuming a state of facts not proven.

A. Yes, sir.

Q. Now you may state whether or not your testimony, so far as it relates to the books of the bank, and the tabulated data which you have furnished and which has been made a part of your testimony, and the opinions you have given as to certain facts derived from an inspection and examination of the books of the bank, is based upon these books which have been identified by these different witnesses who were clerks in the employ of the Capital national bank prior to its failure.

Respondents object as incompetent, irrelevant and immaterial and not the best evidence.

A. Yes, sir, it is.

Q. Have you any personal knowledge derived during the time you were United States bank examiner in this district, so as to be able to state whether you know personally that these books were used in the bank?

Respondents object as incompetent, irrelevant and immaterial.

A. I am satisfied that they are the books of the bank.

Q. I ask you if you had any personal knowledge of them?

A. Yes, sir.

Q. What is it?

Respondents object at immaterial.

A. I remember the style and kind of books used in the bank at the time I made an examination, and recognize at least a part of them now.

Cross-examination by Mr. PETTIS:

Q. When were you bank examiner?

A. In '85.

Q. And some of these books that have been produced here at this second examination were in the bank then?

A. Yes, sir.

320 Q. Which particular books were in the bank then?

A. I don't remember particularly, but I think the certificate of deposit.

Q. What is just your recollection?

A. I am testifying not from recollection.

Q. None of the entries in these books were made by you?

A. No, sir.

Redirect examination by Mr. LAMBERTSON:

Q. I have neglected to call your attention to the testimony of Mr. Outcalt. Did you hear the testimony of Mr. Outcalt?

A. Yes, sir, I did.

Q. And were you present when he identified certain books of the bank?

A. Yes, sir, I was.

Q. Has the testimony given heretofore, so far as it relates to the books and records of the bank, been based on the books identified by Mr. Outcalt, and did it relate to these books?

Respondents object as incompetent, irrelevant and immaterial, and having no proper foundation laid.

A. My testimony has been based upon all the books of the bank so far as referred to in my testimony, and in the statements which I have made, and it included these book identified by the different parties.

Recross-examination by Mr. PETTIS:

Q. Before Mr. Outcalt testified, your clerk pointed out the books to him, did he not?

A. My clerk made a list of the books we wished identified, and laid them aside so they could be easily reached.

Q. And Mr. Outcalt had referred to that list to find out what books were to be identified?

A. No, sir; the clerk referred to the list. Mr. Outcalt did not identify all the books handed to him.

Q. But such as he did identify he identified from the list your clerk made out?

321 & 322 A. No, sir; he did not. I don't think Mr. Outcalt had the list at all; so far as I know he did not.

Q. The books that were handed Mr. Outcalt were handed him in pursuance of the list made out previously, which you said were the books of the bank?

A. Yes, sir; because my clerk had picked out those we wished him to pass upon.

Q. And made a list and told him they were the books of the bank, your clerk did, did he not?

A. I think not.

Q. Why do you think that? Because you were not here when it was done?

A. No; I don't think Mr. Outcalt had the list at all. We made the list up for our own convenience, to pick a few books out of perhaps several years' books.

Q. You do not pretend that these books which you have attempted to get into evidence contain all the transactions of the bank relating to this matter?

A. No, sir. My testimony is chiefly based upon the books which have been identified, but parts of it may, and perhaps do, refer to the other books that were in the bank.

Mr. LAMBERTSON: Are those the books from which the exhibits were made?

A. Yes, sir.

Mr. PETTIS: All of them?

A. I think so.

Q. Are you sure about that?

A. They were, so far as I remember, made from these books.

KENT K. HAYDEN.

* * * * *

323 The complainant then read in evidence the following statement by Mr. Quinlan:

"The cashier of the Chemical national bank, before leaving the bank on Monday, Jan'y 23, 1896, received from the bank examiner a telegram which cannot now be found, stating in substance that the examiner had taken charge of the Capital national bank, and requesting the Chemical national bank not to pay any drafts. My impression is that the telegram did not state when the Capital national bank suspended, nor when the bank examiner took charge of it."

And the following letter:

"James H. Eckels, comptroller.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., December 8, 1896.

Mr. E. W. Paige, 45 Cedar street, New York, N. Y.

SIR: The examiner took possession of the banking-house and property of the Capital National Bank of Lincoln, Nebraska, on the 22nd of January, 1893, and remained in possession until he delivered possession to the receiver, who was appointed some few days afterward.

Very respectfully, JAMES H. ECKELS, *Comptroller.*"

324 We consent that the above proofs be filed.

GEORGE H. YEAMAN,
Counsel for Respondent.
EDWARD WINSLOW PAIGE,
Counsel for Complainant.

Taken as above before me—

JOHN SHIELDS, *Examiner.*

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B.

The respondent reads in evidence the following statements of the three sums of money received by the respondent from the complainant on the 23d. These are the statements enclosed in the letters in which the remittances were received. We admit that they were mailed at Lincoln on the 19th.

Deposited with Chem. Nat. Bank, N. Y., by Capital National Bank.

LINCOLN, NEB., Jan. 19, 1893.

21,928	Quaker Cy., Quaker Cy. Nat., Han.	J. R. Burgess	25
18,323	Salem, Salem Nat., Nat. Bk. of Rep.	R. M. Mills	28 04
150,584	Lin., Cup. Nat., U.	Apses	20
67,381	Seward, 1st, 1st.		31 90
40,673	Auburn, 1st, West Nat.	Hill	44 45
3,412	Toledo, O., Unsos Bk., West Nat.	McMiny	88 50
		D. Alsstulder.	
645,804	Des Moines, S. America, Ass. Tr. U. S.	H. M. Wright	36
601,258	" " " " " "	W. C. Holden	18
12,524	Milford, Blue Val. Bk. Chem.	Winking	2
12,511	Kast, Adams Co. Bk. J. M. Ts.	O. Wise Co.	89 90
12,522	Milford, Blue Val., U.	T. & R.	7
4,511	Oberlin, C. G. Co., Chat. Abilene.	Strater	329
645,618	Des Moines, S. America, Ass. Tr. U. S.	Struth	36 00
639,768	" " " " " "	1 Dutsche	36
605,832	" " " " " "	Men	24
			<hr/>
			\$815 79

Deposited with Chem. Nat. Bank, N. Y., by Capital National Bank.

LINCOLN, NEB., Jan. 19, 1893.

28,653	Hubbell, H. Bk., N. O.	U. S.	25
8,045	Benkham Bk. of U.	"	13 20
25,339	Greenwood, 1st, Cent.	"	16 20
21,491	Mt. Gilead, O., Mans. Co. Nat., U. S. Nat.	John Hathaway	50 00
72,011	Pueblo, Am. Nat., Mer. Nat.	Campbell	5 25
223,217	St. Paul, 1st, U.	Utica	80 00
12,970	N. Y. L'Boutillier Bros., Mackey Bk.	L. J.	3
115,534	Chic., Clements, Ass. Tr. U. S.	Stratton	36
607,977	Des Moines, S. America, Ass. Tr. U. S.	Curtis	30
631,641	" " " " " "	"	24
613,654	" " " " " "	"	42
535,695	" " " " " "	Friend	6
633,109	" " " " " "	"	24
600,567	" " " " " "	Utica	18
630,836	" " " " " "	"	24
649,937	" " " " " "	Stratton	36
649,703	" " " " " "	"	36
632,758	" " " " " "	Brady Island	24
643,738	" " " " " "	"	36
643,082	" " " " " "	Imp.	36
642,283	" " " " " "	"	36
632,542	" " " " " "	Geneva	24
637,183	" " " " " "	"	36
645,772	" " " " " "	Wm. M. Knabe	36

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14,632	Penn Cy., Penn Nat., I Cinn.	Addie Wood	10
73,276	Ft. Watts, Tex. Cy. Nat., Nat. Bk. of Rep.	T. T. Roose	211 30
3,680	St. Thomas, Canada, Impr. Bk., Walter Watson & Co.	"	90 05
16,015	Texarkana, Tex., T. Nat., Seaboard Nat.	"	79 20
109,552	Meadville, Pa., Bk. J. Dick, Am. Exch.	"	29 25
2,537	Greenville, Pa., Pindly Bros., 1st G., Pa.	"	42 65
15,168	Van Buren, Ark., Cy. Bk., Imp. Bk.	"	26 50
518,117	Chic., Mu. L. & Ts. Co., Nat. Bk. of Cin.	H. Bros.	750
34,295	Belle Vernon, Pa., R. F. Jones to Drexel, H. Willmott.		1,000
Morgan Co., Dr.			
			<hr/>
			\$2,935 60

the Packers' National Bank of South Omaha, Neb., remitted to the defendant \$5,000 for the credit and advice of the Capital national bank; and the Capital national bank remitted a package of fifteen items of various sizes, amounting to \$815.79; another of twelve, amounting to \$2,935.60, and the account on the books of the defendant stood overdrawn \$40,807.43. On the 20th the Capital national bank remitted a package of twenty-seven items amounting to \$735. And probably on the 21st it remitted another similar package amounting to \$833.64; and the account stood on the books of the defendant overdrawn \$25,515.32. On the 22d, Sunday, the bank examiner took possession of the Capital national bank and it went into liquidation. On the 23d the defendant received the remittance of \$2,000 of the 18th, and of \$5,000, \$815.79 and \$2,935.60 of the 19th, and of \$735 of the 20th, which it credited to the Capital national bank, and it received notice by telegram from the bank examiner of the suspension; and on the 24th it received the remittance of \$833.64, which it likewise credited and which left the account overdrawn \$13,317.94.

The plaintiff is the receiver of the Capital national bank, and this suit is brought to recover the amount of these remittances received by the defendant on the 23d, \$11,486.39, and that received on the 24th, \$833.64, as having been transferred by that bank contrary to the statute.

That the Capital national bank had been insolvent for a long time before these remittances is amply made to appear; and if the prohibition had been made to turn upon the insolvency these transfers would unquestionably be void and the defendant accountable for the proceeds; but the transfers would be as unquestionably good except for the statute and only those made after an act of insolvency or in contemplation thereof, are by that avoided. Till after these remittances the Capital national bank was carrying on its business of banking in due course without any act of insolvency shown to have been committed, and they were a part of that business which

329 was stopped by the bank examiner because of the bank's state of insolvency, and not because of any act arising from that state. Ultimately but for this interposition the bank must have been driven to such acts, but how soon cannot now be told. The transfers were complete when the remittances were mailed to the defendant and must be considered as having been made in due course and in continuation of lawful business and not in contemplation of committing any act of insolvency. These transactions were like the ordinary business of such a bank done over the counter in the usual way; and for character they are to be compared with the transactions of such business which seem to be valid.

Roberts vs. Hill, 23 Blatchf., 312.

The answer prays that, should an account be ordered, the plaintiff be decreed to pay to the defendant the amount due from the Capital national bank and such a decree is insisted upon in argument. That prayer in the answer would probably be insufficient

for any affirmative relief to the defendant, but whether so or not the defendant is not entitled to anything from the plaintiff, but its dividend, which cannot be decreed now.

Bill dismissed.

HOYT H. WHEELER.

Edward Winslow Paige, for plaintiff.

George H. Yeaman, for defendant.

(Endorsed :) U. S. circuit court, south. dist. N. Y. Kent K. Hayden v. Chemical National Bank. Opinion, Wheeler, J. U. S. circuit court. Filed May 15, 1897. John A. Shields, clerk.

330 Circuit Court of the United States for the Southern District of New York.

KENT K. HAYDEN, as Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant, <i>against</i>	} In Equity.
THE CHEMICAL NATIONAL BANK, Defendant.	

This cause having come on to be heard this 16th day of March, 1897, upon pleadings and proofs, and Mr. E. Winslow Paige having been heard on the part of the complainant, and Mr. George H. Yeaman on the part of the defendant, and due deliberation having been had,

It is ordered, adjudged and decreed, that the said bill of complaint herein be and the same is dismissed upon the merits, with fifty-two and $\frac{2}{10}$ dollars costs to the defendant, as taxed.

HOYT H. WHEELER, Judge.

Form approved.

E. W. PAIGE,

Sol'r for Compl't.

(Endorsed :) U. S. circuit court, southern dist. of New York. Kent K. Hayden, as receiver, &c., compl't, vs. The Chemical National Bank, def't. Decree with notice of settlement. George C. Kobbe, solicitor for defendant, 44 & 46 Wall St., New York city. Service of a copy of the within decree with notice of settlement is hereby admitted. Dated New York, May 20th, 1897. Edward Winslow Paige, solicitor for complainant. U. S. circuit court. Filed May 25, 1897. John A. Shields, clerk.

331 In the Circuit Court of Appeals of the United States for the Second Circuit.

KENT K. HAYDEN, as Receiver of the Capital National Bank of Lincoln, Nebraska, Appellant, <i>against</i>	}
THE CHEMICAL NATIONAL BANK, Respondent.	

Assignment of Errors on Appeal.

And now, on this 26th day of May, 1897, comes the complainant, Kent K. Hayden, as receiver, by Edward Winslow Paige, his solic-

itor, and says that the decree in said cause is erroneous and against the just rights of said complainant, for the following reasons:

1. The court erred in dismissing the bill.

2. The court erred in not rendering a decree in favor of the complainant and against the defendant for the payment, with interest, of the amounts received by the defendant after the 21st day of January, 1893.

3. The court erred in not rendering a decree in favor of the complainant and against the defendant for the payment, with interest, of the sum of \$833.64 received by the defendant on the 24th day of January, 1893.

332 Wherefore, the said complainant prays that the said decree may be reversed.

EDWARD WINSLOW PAIGE,
Solicitor for Complainant.

(Endorsed:) U. S. circuit court of appeals, second circuit. Kent K. Hayden, as receiver, appellant, against The Chemical Nat'l Bank, appellee. Assignment of errors. Edward Winslow Paige, sol. for appellant, 44 Cedar street, New York city. U. S. circuit court. Filed May 26, 1897. John A. Shields, clerk.

Circuit Court of the United States, Southern District of New York.

KENT K. HAYDEN, as Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant, <i>against</i> THE CHEMICAL NATIONAL BANK.	}	In Equity.
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The above-named complainant conceiving himself aggrieved by the decree made and entered on the 25th day of May, 1897, in the above-entitled cause, does hereby appeal from said decree to the United States circuit court of appeals for the second circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree
333 was made, duly authenticated, may be sent to the United States circuit court of appeals for the second circuit.

Dated New York, May 26, 1897.

EDWARD WINSLOW PAIGE,
Solicitor for Complainant, 44 Cedar Street, New York.

The foregoing appeal is hereby allowed and the same being taken by order of the Comptroller of the Currency, it is ordered that said appeal shall operate as a supersedeas without bond.

Dated New York, May 26, 1897.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court. Kent K. Hayden, as receiver, appellant, against The Chemical National Bank, appellee. Petition for appeal and order. Edward Winslow Paige, sol'r for appellant,

44 Cedar street, New York city. Due and timely service of a copy of the within petition and order is hereby admitted. Dated N. Y., May 27, 1897. Geo. C. Kobbe, sol'r for appellee. U. S. circuit court. Filed May 27, 1897. John A. Shields, clerk.

334 In the Circuit Court of Appeals of the United States for the Second Circuit.

KENT K. HAYDEN, Receiver of Capital National Bank, Lincoln, }
Nebraska, Appellant, }
against
THE CHEMICAL NATIONAL BANK, Respondent.

To the Chemical National Bank of New York, a corporation organized and existing under the laws of the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals, for the second circuit, to be holden at the city of New York in said circuit, on the 25th day of June next, pursuant to an appeal allowed herein and filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Kent K. Hayden, as receiver, is appellant and you are respondent, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of New York, in the above-named district, this 26th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

E. H. LACOMBE,
Circuit Judge.

335 (Endorsed:) U. S. circuit court of appeals, second circuit.

Kent K. Hayden, as receiver, against The Chemical National Bank, appellee. Citation. Edward Winslow Paige, sol. for appellant, 44 Cedar street, New York city. Due and timely service of a copy of the within citation is hereby admitted. Dated N. Y., May 27, 1897. Geo. C. Kobbe, sol'r for appellee.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 336, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Kent K. Hayden, as receiver of the Capital National Bank of Lincoln, Nebraska, complainant and appellant, against The Chemical National Bank, defendant, appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to

be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 24th day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the said United States the one hundred and twenty-first.

[SEAL.]

JOHN A. SHIELDS, *Clerk*.

336 U. S. Circuit Court of Appeals, Second Circuit.

HAYDEN, Receiver, etc., Appellant,

vs.

THE CHEMICAL NATIONAL BANK, Appellee. }

WALLACE, *Circuit Judge* :

The Capital National Bank of Lincoln, Nebraska, at the close of business hours, January 22, 1893, stopped business and the next morning, before the bank opened, an officer under the Comptroller of the Currency, because of its insolvency, took control of its affairs and possession of its assets. Its obligations had considerably exceeded its resources since July, 1891, and false entries to conceal its real financial condition had been made from time to time upon its books. To what extent its directors were aware of these entries or of its situation does not appear, but until January 22nd and throughout that day it met all its obligations and carried on its business as usual. On the 18th day of January, 1893, it was indebted to the amount of \$84,486 to the Chemical national bank, with which bank it had kept an account at New York city, upon overdrafts in excess of its deposits and remittances. On that day at St. Joseph, Missouri, the Schuster Hax national bank remitted by mail a draft for \$2,000 to the Chemical bank for the credit of the Capital bank.

January 19th, at South Omaha, Nebraska, the Packers' national bank remitted by mail a draft for \$5,000 to the Chemical bank for the credit of the Capital bank, and the Capital bank itself remitted by mail, at Lincoln, \$815.29 and \$2,935.60 to the Chemical bank. January 20th the Capital bank remitted by mail, at Lincoln, \$735.64 to the Chemical bank, and at some earlier date or on that day it remitted by mail, at Lincoln, to the Chemical bank \$835.64. The \$2,935.60, \$815.29, and \$735.64 were remittances of checks on New York banks for collection and deposit. These various remittances as they were received by the Chemical bank, viz., January 23rd and January 24th, were credited on its books to the Capital bank, and, with credit items received by the Chemical bank from other sources applicable to the account, reduced the debit balance against the Capital bank to \$13,317.94.

This action was brought by the receiver of the Capital bank to recover of the Chemical bank the remittances thus received by it on and after January 18th. The court below held that the title to the remittances passed to the defendant at the time they were severally mailed to it, and as they had been transmitted in the usual course of business before the Capital bank had committed or contemplated committing any act of insolvency, and were received

innocently by the defendant, the defendant was entitled to apply them upon the balance of account owing to it by the Capital bank.

There is no evidence in the record showing or tending to show that the condition of the Capital bank had materially changed recently, or that it was in a situation of greater financial stress after January 18th than it was January 1st or had been previously. So far as appears, its officers expected, down to the time when its doors were closed, that it would go on with its business in the usual way in the future as it had for the last year. Whether the failure was precipitated by a discovery of the real state of affairs by the bank examiner or by the directors, and, if so, when the discovery was made, does not appear. There is not the slightest evidence that the defendant was aware of or suspected the real situation. It had at times refused to permit the Capital bank to increase its overdrafts, but as late as January 19th and 20th, notwithstanding the state of the accounts, it paid drafts of the Capital bank.

Treating the remittances as payments, made at the time they were mailed, the case presents the question whether payments made in the ordinary course of business by a national banking association, which is doing business as usual, to a creditor who received them innocently, are void if it turns out that the association at the time had become in such sense insolvent that its debts were greatly in excess of its assets, and its officers knew or should have known the fact, and knew or should have known that probably at no very distant day it would be obliged to suspend. If they are void, creditors of national banks, whether ordinary customers, depositors, or other banks who acquire their drafts or advance them funds in expectation of remittances, are on a very precarious footing and cannot safely have any dealings with them.

If such payments are void it is because of the effect which must be attributed to section 5242 of the Revised Statutes of the United States. That section declares that all transfers of the securities of a national banking association and all payments of money "made after the commission of an act of bankruptcy or contemplation thereof, made with a view of preventing the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be wholly null and void." The section does not invalidate every payment made by a national bank, except of its circulating notes after it becomes insolvent, or even after its managers become aware of its insolvency. If it had been intended to do so that intention could have been readily declared in short and plain terms.

Insolvency, in legal definition, does not mean that condition in which a business concern is placed when it finds that upon the settlement and winding up of its affairs it will be unable to pay its debts in full. It means a present inability to pay current obligations as they mature (*Thompson vs. Thompson*, 4 Cush., 127; *Venard vs. McConnell*, 11 Allen, 555; *Wegler vs. Hall*, 16 Wall., 599). An act of insolvency takes place when a business concern or a bank has

failed to pay some of its obligations, made an assignment for the benefit of creditors, suspended business, or done any of those things which indicate to creditors that a debtor has become insolvent. A bank or a business concern may be considered to be acting in contemplation of insolvency when, in making some disposition of its assets, it is actuated by its knowledge of its insolvency.

The statute undoubtedly makes a payment void when it is intended on the part of the bank to prefer one creditor to another or defeat the distribution of its assets in the manner prescribed by law, notwithstanding the creditor receiving it does so with no suspicion of the purpose of the bank in making it. In all the adjudged cases, however, in which this construction has been given to the statute an act of insolvency preceded or accompanied the transaction which was set aside (*Bank vs. Colby*, 21 Wall., 609; *Case vs. Citizens' Bank*, 2 Woods, 23; *Roberts vs. Hill*, 23 Blatchford, 312; *Security Bank vs. Butler*, 129 U. S., 223).

The Capital bank had not committed an act of insolvency. Assuming that its managers knew that its liabilities greatly exceeded its resources, and that it would presently be unable to meet its obligations and have to suspend, there is no evidence that the payments in controversy were influenced by that knowledge. A payment to a depositor or other creditor in the usual course of the bank's business as a going concern and not preparatory in any sense to the anticipated insolvency of the bank is not, we think, within the condemnation of the statute. An act done by a corporation in the ordinary and usual course of business, uninfluenced by the state of its affairs, cannot be said to have been done in contemplation of insolvency (*Dutcher vs. Importers' and Traders' National Bank*, 59 N. Y., 5). See also *Hayes vs. Beardsley*, 136 N. Y., 299; *Stone vs. Jennison*, 36 Law Rep. Ann., 675. We are therefore of the opinion that the payments were valid if the remittances belonged to the defendant from the time they were in the course of transmission to it by mail.

It is the custom of banks generally, in transmitting commercial paper to their correspondents, whether for collection or as credit items, to send them by mail. The remittances here were mailed by senders who intended that they should be the property of the defendant and be applied by it as credit items upon the account of the Capital bank. By mailing a letter the sender abandons his dominion over it and places it at the disposal of the person to whom it is addressed. His act unequivocally manifests that purpose. The import of the act is the same when the letter contains a remittance. It is placed at the disposal of the person to whom it is sent, and he is at liberty to appropriate the remittance in any way consistent with the understanding of the parties, express or implied, from their business dealings existing when the letter was mailed. In *Canterberry vs. Bank* (30 Law Rep. Ann., 845) the supreme court of Wisconsin decided that a bank which at its customer's request mailed its own draft to another bank, to be used for the customer's credit, could not by intercepting the draft in the mail upon the discovery of the customer's insolvency defeat the title of the bank to

which it was sent. The court declared that the mailing of the letter inclosing the draft was in legal effect a delivery of the draft to the bank to which the letter was addressed. In *Johnson vs. Sharp* (31 Ohio, 611) it was decided that the mailing of an assignment by the assignor named in the instrument to the assignee named therein invested the assignee with title to the property conveyed by the instrument from the time of the deposit in the post-office as against

subsequent attaching creditors of the assignee. The court said: "By that act the assignor ceased to have control of it,

and having placed it in the mail for the assignee, who by previous conduct has consented to accept the trust, the possession of the carrier must be regarded as the possession of the assignee." The same proposition was decided by the supreme court of Pennsylvania in *McKinney vs. Rhoads* (5 Watts, 343) and by the court of appeals of South Carolina in *Dargan vs. Richardson*, 1 Cheves Rep., 197; *Kirkham vs. Bank* (2 Caldwell, 397). See also *Mitchell vs. Byrne* (6 Rich. L., 171), 1 Daniel's Negotiable Instruments, section 67.

The mailing of the remittances to the defendant did not of itself and unconditionally entitle the Capital bank to be credited with their amount. They were not sent at the request of the defendant, and the circumstances are inconsistent with any understanding that they were sent at its risk. The fact that they became its property when mailed does not necessarily imply that it was to account for their value if they were lost or if nothing was ever realized from them. If a letter miscarries, is abstracted or destroyed or from any other cause fails to reach its proper destination, the loss of its contents will fall upon the party who has assumed the risk of its transmission. If by the course of business or the arrangement between the two banks the remittances were not to be credited until they were received by the defendant the risk of loss in transit — upon the Capital bank; and if it did, it does not prove that the remittances were not the property of the defendant when they were deposited in the mail.

For these reasons we conclude that the decree below was right, and it is therefore affirmed with costs.

343 (Endorsed:) *Hayden, receiver, vs. Chemical Nat. Bank.*
Opinion. United States circuit court of appeals, second circuit. Filed Jan. 25, 1898. William Parkin, clerk.

344 At a stated term of the United States circuit court of appeals for the second circuit, held at the United States court-rooms, in the city of New York, on the 31st day of January, 1898.

Present: The Honorables William J. Wallace, E. Henry Lacombe, Nathaniel Shipman, circuit judges.

KENT K. HAYDEN, as Receiver of the Capital National Bank of Lincoln, Nebraska, Appellant,	}
vs.	
THE CHEMICAL NATIONAL BANK, Appellee.	

The appeal to this court from the decree of the circuit court of the United States for the southern district of New York, made and

entered in the above-entitled cause on the 25th day of May, 1897, dismissing the bill of complaint herein, having come on to be heard on the transcript of the record from the said court, and Mr. Edward Winslow Paige, of counsel for the appellant, having been heard on the part of the appellant, and Mr. George H. Yeaman, of counsel for the appellee, having been heard on the part of the appellee, now, on motion of George H. Yeaman, Esq., of counsel for the appellee, it is—

Ordered, adjudged, and decreed that the decree aforesaid be, and the same is hereby, in all things affirmed with costs; and it is further—

Ordered, adjudged, and decreed that a mandate issue to the circuit court of the United States for the southern district of
345 New York, directing that court to proceed in accordance with the opinion of this court.

W. J. W., E. H. L., N. S.

Approved as to form.

EDWARD WINSLOW PAIGE,
Solicitor and Counsel for Appellant.

Endorsed: U. S. circuit court of appeals, second circuit. Kent K. Hayden, as receiver, etc., *vs.* The Chemical National Bank, appellee. Original decree. George C. Kobbe, solicitor for appellee, 44 and 46 Wall street, New York city.

346 U. S. Circuit Court of Appeals.

KENT K. HAYDEN, as Receiver of the Capital National Bank of Lincoln, Nebraska, Complainant,	}
<i>vs.</i>	
THE CHEMICAL NATIONAL BANK, Defendant.	

The complainant does hereby appeal to the Supreme Court of the United States from the decree of the circuit court of appeals for the second circuit, which was rendered in the above-entitled action on the thirty-first day of January, 1898.

Dated New York, February 1st, 1898.

(Signed) EDWARD WINSLOW PAIGE,
Complainant's Solicitor.

The foregoing appeal is hereby allowed, and the same being taken by the order of the Comptroller of the Currency, it is allowed without bond.

Dated February 1st, 1898.

(Signed) E. H. LACOMBE, U. S. C. J.

347 The President of the United States of America to the Chemical National Bank:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., within twenty days from the date hereof, pursuant to an appeal allowed

herein from a decree of the circuit court of appeals for the second circuit, rendered on the thirty-first day of January, 1898, in an action wherein Kent K. Hayden, as receiver, etc., is complainant and you are defendant, to show cause, if any there be, why the decree should not be reversed and speedy justice done in the premises.

Given under my hand, at the city of New York, in the said district, this 1 day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

E. H. LACOMBE, U. S. C. J.

Service of within citation admitted this seventh day of February, 1898.

GEO. H. YEAMAN,

Counsel for Chemical National Bank.

348 [Endorsed:] U. S. circuit court of appeals, second circuit.

Kent K. Hayden, as receiver, etc., complainant, against The Chemical Bank, defendant. Citation. Edward Winslow Paige, sol. for complainant, 44 Cedar street, New York city. United States circuit court of appeals, second circuit. Filed Feb. 8, 1898. William Parkin, clerk.

349 UNITED STATES OF AMERICA, }
Southern District of New York, } ss :

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 347, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Kent K. Hayden, as receiver, etc., complainant, appellant, against The Chemical National Bank, defendant, appellee, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 9th day of February, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the said United States the one hundred and twenty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

350 In the Supreme Court of the United States.

KENT K. HAYDEN, as Receiver of the Concerns of the Capital }
National Bank of Lincoln, Nebraska, Appellant, }
against }
THE CHEMICAL NATIONAL BANK. }

We agree and stipulate that the following parts of the record only be printed :

1. From the beginning of the record to and including folio 88, page 30, of the print.

2. From the beginning of folio 173, page 58, of the print and page 32 of the record, to and including the answer in folio 180, page 60, of the print and page 34 of the record.

3. All of folio 188.

4. From the beginning of the first question in folio 198, page 66, of the print and 40 of the record, to and including the answer in folio 214, page 72, of the print and page 46 of the record.

5. From and including the question in folio 216, page 72, of the print and page 46 of the record, to and including the first answer in folio 270, page 90, of the print and page 64 of the record.

6. From and including the first question in folio 277, page 93, of the print and page 67 of the record, to but excluding the question in folio 324, page 108, of the print and page 82 of the record.

7. From and including the question in folio 335, page 112 of the print and page 86 of the record, to and including the last answer in folio 339, page 113 of the print and page 87 of the record.

8. From and including folio 340, page 114 of the print and page 88 of the record, to and including the last question in folio 375, page 125 of the print and page 99 of the record.

9. From and including the question in folio 389, page 130 of the print and 104 of the record, to and including the answer in folio 392, page 131 of the print and 105 of the record.

10. The last paragraph of folio 392, from the words "Mr. Hayden" to "bank," inclusive.

11. Folio 393 to and including the first answer in folio 406.

12. The first and second questions and answers in folio 409.

13. From and including the words "Q. Mr. Hayden," in folio 435, to and including the words "Q. Real and personal? A. Yes, sir," in folio 436.

14. All of folio 508.

15. All of folio 537.

16. From and including the words "J. D. Macfarland," in folio 546, page 182 of the print and 156 of the record, to and including the first answer in folio 561, page 187 of the print and 161 of the record.

17. The last question and answer in folio 574 (omitting objection) and the first question and answer in folio 575 (omitting objection).

18. From and including "recross," in folio 577, to and including "other business," in folio 578.

19. From and including folio 591, in page 197 of the print and page 171 of the record, to, but excluding, the cross-examination in folio 600, page 200 of the print and 174 of the record.

20. From and including the words "Halleck C. Young," in folio 633, page 211 of the print and page 185 of the record, to and including the first answer in folio 640, page 214 of the print and 188 of the record.

21. From and including the words "S. K. Hale," in folio 643, page 215 of the print and 189 of the record, to, but excluding, the cross-

examination in folio 691, page 231 of the print and page 205 of the record.

22. From and including folio 754, page 252 of the print and page 226 of the record, to, but excluding, the words "Exhibit 12," in folio 761, page 254 of the print and page 228 of the record.

23. From and including folio 764, page 255 of the print and page 229 of the record, to and including folio 795, page 265 of the print and page 239 of the record.

24. All of folios 796 and 801, inclusive.

25. From and including folio 802, page 268 of the print and page 242 of the record, to and including folio 807, page 269 of the print and page 243 of the record.

353 26. Exhibit 59, being pages 259 and 260 of the record.

27. Exhibit 68, page 278 of the record (folios 910 to 912 not numbered).

28. From and including the words "J. A. Crumpton," in folio 970, page 324 of the print and 298 of the record, to and including the last answer in folio 990, page 330 of the print and page 304 of the record.

29. From and including the words "M. H. Simonds," in folio 999, page 333 of the print and 307 of the record, to and including folio 1020, in page 340 of the print and 314 of the record.

30. From and including folio 1029, in page 343 of the print and page 317 of the record, to and including the words "Kent K. Hayden," in folio 1041, in page 347 of the print and page 321 of the record.

31. From and including folio 1045, in page 349 of the print and 323 of the record, to and including the end of the record.

Where pages of the record are referred to above, pages of the record used in the circuit court of appeals are meant.

New York, July 19, 1898.

EDWARD WINSLOW PAIGE,
Of Counsel for Appellant.
GEORGE C. KOBBE,
Solicitor for Appellee.
GEO. H. YEAMAN, *Of Counsel.*

354 [Endorsed:] U. S. Supreme Court. Kent K. Hayden, as receiver, etc., plaintiff, against Chemical Nat'l Bank, defendant. Stipulation regarding printing of record. Edward Winslow Paige, attorney for —, 44 Cedar street, New York city.

355 [Endorsed:] Case No. 16,795. Supreme Court U. S., October term, 1898. Term No., 242. Kent K. Hayden, rec'r, &c., app't, vs. The Chemical National Bank. Stipulation to omit parts of record in printing. Filed July 22, 1898.

Endorsed on cover: Case No. 16,795. U. S. C. C. of appeals, 2nd circuit. Term No., 242. Kent K. Hayden, as receiver of the Capital National Bank of Lincoln, Nebraska, appellant, vs. The Chemical National Bank. Filed February 14, 1898.

IN THE
Supreme Court of the United States.

NUMBER TWO HUNDRED AND FORTY-
TWO OF OCTOBER TERM, 1897.

KENT K. HAYDEN, Appellant, <i>against</i> THE CHEMICAL NATIONAL BANK.	}
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BRIEF FOR APPELLANT.

Abstract or Statement of the Case.

FIRST HEAD : *Condition and Nature of the Action.*

This is an appeal by the complainant from a decree of the circuit court of appeals for the second circuit affirming a decree of the circuit court for the southern district of New York, which dismissed the bill.

The bill was exhibited by Mr. Hayden, as receiver of the concerns of the Capital National Bank of Lincoln, Nebraska, in the endeavor to make the appellee account for certain monies which had once belonged to that bank, and which the appellee received after the national bank examiner had closed that bank.

SECOND HEAD: *When the Appellee received the Monies.*

The Capital National Bank finally closed its doors on the *twenty-first* of January, one thousand eight hundred and ninety-three, at the usual hour of closing.

Upon the next day—the *twenty-second* of January—and before any business had been transacted, the national bank examiner took possession (R. 114).

Upon the *next* day—the *twenty-third*—the respondent received, for the account of the Capital National Bank, the following sums:

\$2,935	60
815	79
735	00
5,000	00
2,000	00
<hr/>	
\$11,486	39 (R. 19).

And upon the *next* day—the *twenty-fourth*—it received also for the account of the Capital National Bank

\$833 64 (R. 19).

These sums it claims to be entitled to keep as its own, because it was then a creditor of the Capital National Bank in a sum greater than the aggregate of those sums.

Before the close of business on the twenty-third the appellee was informed, by telegraph, by the bank examiner that he was in possession of the concerns of the Capital National Bank, and that it—the appellee—must not pay any more drafts (R. 119).

Chronologically, then, the facts come thus:

January 21. The bank closes as usual.

“ 22. Before the transaction of any business the bank examiner takes possession.

“ 23. The appellee receives \$11,486.39—in five different ways—for account of the bank. Presumably this will be in the *morning*.

“ 23. The appellee receives the bank examiner's telegram informing it that he is in possession of the bank's concerns, and that it—the appellee—must not pay any more drafts. Presumably this will be in the *afternoon*, and, of course, after the appellee had received the above five sums of money.

January 24. The appellee receives, for the account of the Capital National, the final sum of \$833.64.

THIRD HEAD: *Where the Monies came from.*

The sum of \$5,000, received on the twenty-third, came from the Packers' National Bank of South Omaha, Nebraska, and had been mailed to the Chemical on the nineteenth “for credit and advice” of the Capital National Bank. (R. 22).

The sum of \$2,000, received on the twenty-third, came from the Schuster Hax National Bank of St. Joseph, Mo., and was mailed to the Chemical on the eighteenth “for the credit of” the Capital National Bank. (R. 22).

The \$2,835.60, the \$815.79 and the \$735 consisted of a lot of small cheques on New York, seventy-five in number, which the Capital National sent to the Chemical for collection and deposit. They were mailed at Lincoln in three letters on the nineteenth and twentieth. (R. 115-116).

Where and how the Chemical got the last sum of \$833.64, which it admits it got on the twenty-fourth (R. 19), it has not told us.

FOURTH HEAD.—*The Insolvency of the Capital National.*

The bank had been insolvent certainly since July, 1891.

Its officers had been making false entries to cover up its condition as early as 1883—*nine years before* (R. 38), and continuing the practice. (R. 39, 40–45, 91–96, 98.)

When the examiner took possession the condition of things was as bad as this:

The nominal assets of the bank amounted in the aggregate to \$1,117,328.83, and its liabilities to \$1,435,605.63 (R. 24). Assuming, therefore, all its assets to be good, they would not have been sufficient to pay its debts within the sum of \$318,276.80. But they were not by any means all good. On the contrary, \$601,058.20 were worthless; \$190,057.12 of them doubtful, and but \$326,213.51 good.

The details are as follows:

	GOOD.	DOUBTFUL.	WORTHLESS.
Bills receivable.	\$236,935 62	\$170,766 41	\$584,269 27
Real estate and equities..	60,000 00	.....	.....
Other assets.....	29,277 89	19,290 71	16,788 93
Totals.....	\$326,213 51	\$190,057 12	\$601,058 20

(R. 25.)

Of the good bills receivable \$187,270.56 were held by other banks (R. 25).

It thus appears that the bank had then at the utmost but \$78,942.95 (balance of the good bills receivable, \$49,665.06, and good "other assets," \$29,277.89), with which to meet its liabilities of \$1,435,605.63, or *about five and one-half per cent.*

The books of the bank showed outstanding certificates of deposit of \$18,946.77, the real amounts

of which were \$592,054.50. This difference was not made by additional certificates. The numbers and dates of the certificates are correctly given, but the *amounts* differ, as above (R. 98).

FIFTH HEAD: *The account between the two banks.*

On the third of January the account of the Capital National Bank with the Chemical was overdrawn \$49,388.51 (R. 9).

Nevertheless the Chemical continued to pay all its drafts until the seventeenth—when it threw out a draft of \$5,000 (R. 19)—although it had that day received \$13,940.79 (R. 18).

The overdraft at the close of that day—and after the throwing out of the draft of \$5,000—was \$82,996.31 (R. 16).

Upon the eighteenth it paid drafts

amounting to (R. 16).....	\$6,291.38
And charged up interest amounting to..	76.28
Total	<u>\$6,367.66</u>

And received \$4,877.78 (R. 18), leaving the overdraft \$84,486.19.

And it threw out a draft of \$5,000 (R. 21).

On the nineteenth it paid drafts amounting to \$1,471.24 (R. 16).

And it received \$1,000—and credited various other items amounting to \$44,150.30 (R. 18)—leaving the overdraft \$40,807.13.

On the twentieth it paid drafts aggregating \$2,200.04 (R. 17), and received \$12,059.40 (R. 18), leaving the overdraft \$30,947.77.

After this it *paid nothing*. On the twenty-first it received \$5,432.45 (R. 19), leaving the overdraft \$25,515.32.

On that day it threw out a draft of \$5,500 (R. 21).

This was the condition of things when the bank examiner took possession—an overdraft of \$25,515.32.

On the following day, as already stated, it received \$11,486.39 (R. 19), and on the day after that \$833.64 (R. 19).

These amounts it seeks to retain and apply on the overdraft.

In addition to the drafts thrown out, as above stated, it threw out other drafts aggregating \$28,764.66 (R. 20-21).

Drafts were drawn by the Capital National on the Chemical, as follows:

On the nineteenth.....	\$29.50
	2,000.00
	50.00
	3,500.00

\$5,579.50

On the twentieth.....	\$2,000.00
	90.00
	101.82
	32.00
	72.59
	64.18
	302.00
	4.28
	194.12
	25.00
	91.44
	61.90
	5,000.00

\$8,039.33

On the twenty-first.....	\$20.70
	104.70
	97.40
	16.48
	9.75
	40.00
	98.50
	8.40
	1,500.00

1,887.93

Total.....	\$15,506.76
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(R. 20-21.)

Of course exceeding the remittances in question.

ACTS OF CONGRESS ARE AS FOL- LWS:

REVISED STATUTES:

“ SEC. 5234. On becoming satisfied, as specified
“ in sections fifty-two hundred and twenty-six and
“ fifty-two hundred and twenty-seven, that any
“ association has refused to pay its circulating
“ notes as therein mentioned, and is in default,

By the Act of 1876 it is on becoming satisfied that the association is
insolvent.

“ the Comptroller of the Currency *may* forth-
“ with appoint a Receiver and require of him such
“ bond and security as he deems proper. Such
“ Receiver, under the direction of the Comptroller,
“ shall take possession of the books, records and
“ assets of every description of such association,
“ collect all debts, dues and claims belonging to it,
“ and, upon the order of a court of record of com-
“ petent jurisdiction, may sell or compound all
“ bad or doubtful debts, and, on a like order, may
“ sell all the real and personal property of such
“ association, on such terms as the Court shall di-
“ rect; and may, if necessary to pay the debts of
“ such association, enforce the individual liability
“ of the stockholders. Such Receiver shall pay
“ over all money so made to the Treasurer of the
“ United States, subject to the order of the Comp-
“ troller, and also make report to the Comptroller
“ of all his acts and proceedings.”

“ SEC. 5236. From time to time, after full pro-
“ vision has been first made for refunding to the
“ United States any deficiency in redeeming the
“ notes of such association, the Comptroller shall
“ make a *ratable* dividend of the money so paid
“ over to him by such receiver on all such claims
“ as may have been proved to his satisfaction or
“ adjudicated in a court of competent jurisdiction,

“ and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated ; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.”

“ SEC. 5242. All transfers of the notes, bonds, bills of exchange, or other evidences of debt, owing to any national banking association, or of deposits to its credit ; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor ; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors ; and all payments of money to either, made *after the commission of an act of insolvency or in contemplation thereof*, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void ; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county or municipal court.”

(Italics mine.)

BRIEF OF THE ARGUMENT.

I.

After the comptroller of the currency, through his examiner, had taken possession, no creditor could keep anything.

National Bank vs. Colby, 21 Wall., 609, was this :

On the 15th of a certain April, the bank in question refused payment of a certain draft.

On the next day, the sixteenth, the concerns of the bank were taken possession of by the *military* authorities of the United States *under instructions from the Secretary of the Treasury* (p. 610).

On the *next* day, Colby, a creditor, got an attachment and *levied* on certain property of the bank, *which was not in the possession of the military authorities.*

This was while the bank was still in possession of the military authorities, and before the appointment of a receiver (p. 610); and it was also *before the enactment which prohibited attachments against national banks, and while they were still lawful.*

Nevertheless the Court held the attachment was invalid, and, speaking by Mr. Justice Field, it said :

That it was the design, on the part of Congress,
“ to secure the assets of the bank for ratable dis-
“ tribution among its general creditors.

“ This design would be defeated if a preference
“ in the application of the assets could be obtained
“ by adversary proceedings ” (pp. 613-614).

In *White vs. Knox*, 111 U. S. 784, the Court,

speaking by Mr. Chief Justice Waite, said (p. 787):

“The business of the bank must stop when insolvency is declared. Rev. Stat. sec. 5228. No new debt can be made after that. The only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him or by the adjudication of a competent court to have had their origin in something done before the insolvency. It is clearly his duty, therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution.”

And the first sentence of this language is quoted by the Court with approval in *Richmond v. Irons*, 121 U. S. 27, 61.

And in *Scott vs. Armstrong*, 146 U. S. 499, the Court, speaking by Mr. Chief Justice Fuller, said (p. 511):

“The state of case where the claim sought to be offset is acquired after the act of insolvency is far otherwise, for the rights of the parties become fixed as of that time, and to sustain such a transfer would defeat the object of these provisions.”

Of course the taking possession of the bank by the comptroller of the currency is both the most distinct sort of declaration of insolvency and the most open and notorious of acts of insolvency.

National Security Bank vs. Butler, 129 U. S. 223, 232.

And it follows that the sum of eight hundred and thirty-three dollars and sixty-four cents (\$833.64) which the Chemical received on the twenty-fourth—two days *after* the bank examiner had taken possession—from a source and in a manner which it has not disclosed to us, it cannot keep.

II.

The fact that the other remittances were mailed before the bank examiner took possession does not make them the property of the Chemical as of the date of mailing.

If the cheques had been deposited in the mail pursuant to any agreement, as was the case in the decisions cited below, or even if the respondent had known anything about them, the case would be very different; but here is a bank sending cheques of other parties to its agent for collection and deposit. It could have sent them to any other agent had it pleased, and after it had once put them in the mail it could have taken them out again.

Suppose in the course of transit they had been destroyed, upon which bank would the loss have fallen?

Or suppose, instead of sending cheques, it had sent Treasury notes and they had been burned, upon which bank would the loss have fallen?

The claim is that the deposit of the cheques in the mail was a delivery. But there cannot be a delivery without an acceptance. A delivery cannot be forced upon any one against his will, and here there could not possibly be any acceptance by the Chemical until after the bank examiner had taken possession, because the Chemical did not know about it before.

Let us now suppose that the mail authorities in receiving the letters *assumed to act as the agent of the Chemical in accepting the delivery.*

This, it is submitted, is the only possible assumption left. Here is an act which would be susceptible of ratification, and let us say that it

was ratified by the Chemical on the twenty-third and twenty-fourth.

Ratification, *as between the original parties*, is equivalent to a precedent authority. *But* it is not so where the rights of third parties have intervened. *As to them the act dates only from the date of the ratification.*

It is evident that this must be so. . otherwise, assuming there to have been no negligence, the ratification could be made a year, or an hundred years, after the assumption of agency.

There was therefore no delivery until the acceptance of it by the Chemical, after the examiner had taken possession, and the cheques were still the property of the Capital when the examiner took possession on the twenty-second.

There is another aspect of the matter.

The Chemical acted in two capacities, as an agent and as a creditor.

In its capacity as agent it was to receive the cheques and make the deposit to the credit of the Capital. *After the deposit was made and not until it was made*, it could keep the money because of the overdraft. But until the deposit was actually and in fact made it was the simple agent of the Capital and bound to obey its orders.

If, therefore, after the cheques had been deposited in the mail, but before they had been received by the Chemical, the Capital had in any way got possession of them, it could have kept them as its own property. And if, after they had been deposited in the mail, it had sent to the Chemical a telegram, directing it not to deposit the cheques but to turn them over to some one else, the latter would have been bound to obey.

What the Capital could do the bank examiner of course could do, and the law has done it for him as a consequence of his taking possession.

The mail is not any different from any other carrier.

Judge Wallace cites :

Canterbury v. Bank of Sparta, 91 Wis., 53;

Johnson v. Sharp, 310 Ohio St., 611, 618;

McKinney v. Rhoads, 5 Watts, 343;

Dargan v. Richardson, Cheves, 197;

Kirkman v. The Bank of America, 2 Cold., 397;

Mitchell v. Byrne, 6 Rich. (Law), 171, and

1 Dan. Neg. Instr. (4th ed.), § 67.
(R. 124.)

The only case which apparently bears out the position that the mail is better than any other sort of carrier is *Canterbury v. Bank of Sparta*, 91 Wis., 52.

The other cases are as follows:—*Johnson v. Sharp*, 31 Ohio St., 611. Sharp, a creditor of Wallace, prepared and sent to Wallace for execution, a deed of assignment to Sharp, in trust, of all Wallace's property, for the benefit of all Wallace's creditors. Wallace executed it and put it in the mail directed to Sharp. The court held that this was a delivery—but it did not hold it to be a delivery because of the peculiar character or sacredness of the United States mail. On the contrary it said (p. 618): "having placed it in the mail for " Sharp, the assignee, who, by his previous conduct, had consented to accept the trust, the possession of the carrier must be regarded as the " possession of the assignee."

Of course here was a prior agreement.

In *McKinney v. Rhoads*, 5 Watts, 343,—the

court held that the delivery of an assignment in trust being necessary to make it a deed, the deposit of it in the post office, directed to the assignee, "is equally available for that purpose as a "delivery of it to a messenger" (p. 345).

Here also was a precedent agreement.

In *Dargan vs. Richardson*, Cheves, 197, Long made an assignment of goods to Dargan, and being about to leave the State, mailed the assignment to Dargan.

The court said (p. 199): "If a bill of sale (as "has been decided), *delivered to a stranger* for "the use of a third person, is a valid transfer from "the date of delivery, if the vendee accepts; *by "parity of reason*, where a transfer of personal "property is made by writing contained in a letter, "if the person to whom the letter is addressed, "accepts it, it shall have relation back to the date "of the letter."

In *Kirkman v. The Bank of America*, 2 Cold., 397, there was an express agreement that W. E. Newell & Co. were to send by mail to Kirkman & Luke four notes, endorsed in a certain way. They did so. One of the four notes was lost in the mail. The court held that it had been delivered, and that Kirkman and Luke could recover upon it. There was not any question of time in this case.

In *Mitchell v. Byrne*, 6 Rich. (Law), 171 the plaintiffs drew bills on Booth in Live pool which Booth accepted but failed to pay. Moon paid them "for the honor" of the plaintiffs, charged the plaintiffs with the amount and remitted the bills to them by mail. The court held that Moon could not have recovered back the bills by an action of trover, "because he had agreed to accept the "personal liability of the plaintiffs for the pay-

"ment; and, in execution of that agreement, had charged the plaintiffs in account, with the amount of the bills, and had surrendered the bills to them. The plaintiffs' title to the bills was complete when they were mailed to their address by Moon."

In 1 Dan. Neg. Instr., § 67 Mr. Daniel says that "depositing them (bills) in the post-office, *with the assent of the payee or endorsee*, is considered sufficient (delivery) in the United States." He also says in the same section that "delivery may be made to one person for another."

There remains the case of *Canterbury v. The Bank of Sparta*, 91 Wis. 53. That case was this: Canterbury made a draft on one Coates which was presented by the Bank of Sparta, where Coates kept an account. The account however was overdrawn. It was accepted by Coates—who told the bank to pay it. The bank made out its draft on a Chicago bank, for the amount, and mailed it to a bank at La Crosse from which the draft of Canterbury on Coates had come, with a letter stating it be "in payment of" that draft, and it gave a corresponding credit to Coates (p. 56). Learning later in the day that Coates had failed, it, by telephone, got the draft from the post-office at La Crosse; destroyed it; erased all the entries which it had in its books "respecting the payment of the draft" (p. 55) and protested the draft of Canterbury on Coates for non payment. The La Crosse bank thereupon assigned to Canterbury such cause of action as it had, and he sued the Bank of Sparta. The court held it to be liable.

If by this holding, it was intended that the mail was different from any other sort of *carrier* or messenger, so that if a thing was put in the mail it could not be stopped in transit—because it was *the mail*—not one of the cases cited in the opinion

bears it out. But I submit that it was not intended to so decide.

The court said (p. 57):

"The draft was not committed to W. E. Coates and Co., but WAS TRANSMITTED BY THEM, *through the defendant*, to the bank at LaCrosse."

And it cites *Boylston Nat. Bk. v. Richardson*, 101 Mass., 287; *Pacific Bk. v. Mitchell*, 9 Met., 297; *Pratt v. Foote*, 9 N. Y., 463; *Whitney v. City Bank*, 77 N. Y., 363; and *Eaton v. Cook*, 32 Vt., 58. None of these cases have anything to do with the effect of deposit *in the mail*—but bear upon the other question—that by the acts of the bank it had deliberately taken Coates' personal credit and thus made itself liable.

Thus there is no case holding that the mail is different from any other sort of messenger.

In *Curran v. Arkansas*, 15 How., 304, the court speaking by Mr. justice Curtis, said (p. 313): "If a person deposit his property in the hands of an agent he may revoke the agency and withdraw his property at his pleasure."

The late Lord Westbury is reported to have said, when something of this kind was being argued before him: "If I send my office boy with money, cannot I call him back? Has he suddenly been turned into a trustee for the man to whom I told him to take the money?"

In the opinion below it is said: "The mailing of the remittances to the defendant did not of itself and unconditionally entitle the Capitol

"Bank to be credited with their amount. They
 "were not sent at the request of the defendant,
 "and the circumstances are inconsistent with any
 "understanding that they were sent at its risk.
 "The fact that they became its property when
 "mailed does not necessarily imply that it was to
 "account for their value if they were lost or if
 "nothing was ever realized from them. If a
 "letter miscarries, is abstracted or destroyed, or
 "for any other cause fails to reach its proper
 "destination, the loss of its contents will fall upon
 "the party who has assumed the risk of its trans-
 "mission. If by the course of business or the
 "arrangement between the two banks the re-
 "mittances were not to be credited until they were
 "received by the defendant, the risk of loss in
 "transit rested upon the Capital Bank; and *if it*
 "*did, it does not prove that the remittances were*
 "*not the property of the defendant when they*
 "*were deposited in the mail.*"

This, we submit, begs the whole question.

In the judgment of Lord Ellenborough, in *Williams v. Everett* (14 East, 592), which was also the judgment of the court, it was said (p. 597):

"If it be money had and received for the use of
 "the plaintiff under the orders which accompanied
 "the remittance, it occurs as fit to be asked, *when*
 "did it become so? It could not be so before the
 "money was received on the bill becoming due:
 "and at that instant, suppose the defendants had
 "been robbed of the cash or notes in which the
 "bill in question had been paid, or they had been
 "burnt or lost by accident, who would have borne
 "the loss thus occasioned? Surely the remitter,
 "*Kelly*, and not the plaintiff and his other credi-
 "tors, in whose favour he had directed the
 "application of the money according to their
 "several proportions to be made. *This appears*

“to us to decide the question: for in all cases of special property lost in the hands of an agent, where the agent is not himself responsible for the cause of the loss, *the liability to bear the loss is the test and consequence of being the proprietor, as the principal of such agent.*”

In that great case it was also said (p. 597): “By the act of receiving the bill, the defendants agree to hold it till paid, and its contents when paid, for the use of the remitter. *It is entire to the remitter to give and countermand, his own directions respecting the bill as often as he pleases,* and the persons to whom the bill is remitted may still hold the bill till received, and its amount when received, for the use of the remitter, until by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person.”

But so far as the item of \$833.64 is concerned—as already said, there is not the slightest proof that it was mailed before the twenty-second or that it ever came by mail at all. If the fact had been so the Chemical Bank could have proved it, as it did prove it in regard to the other items (R. 22, 114–116). It has simply admitted that it received that sum on that day for account of the Capital National (R. 19).

Judge Wheeler, in his opinion, deals with this matter by saying (R. 117) that “probably” this sum had also been sent by mail—the court of appeals deals with it by taking no notice of it.

III.

The remittances were mailed after the commission of an "act of insolvency," as well as in contemplation of insolvency.

The Chemical threw out a cheque for \$5,000—on the seventeenth, the day *before* the *first* of these remittances was mailed (R. 19). This is an *act* of insolvency.

In *Brown v. Montgomery*, 20 N. Y. 287, the court said, by Judge Denio (p. 291):

"When a business man in a commercial town fails to meet his paper, payable at a bank, and especially his checks upon the bank at which he keeps his account, the natural inference which every one draws is, that he is no longer able to pay his debts. Such a circumstance may occur from oversight or accident, but those are exceptional cases. The failure to meet the paper is itself a suspension of payment, and notice of such a fact, unaccompanied with any explanation which would give it a different character, is notice of the commercial failure of the party."

The general rule as given in 2 Morse on Banks and Banking, § 623a, is:

"Insolvency is that condition of affairs in which a merchant or business man is unable to meet his obligations as they mature in the usual course of business. An *act of insolvency* takes place when this condition is demonstrated and the person has actually failed to meet some of his obligations. A bank is in *contemplation of insolvency* reasonably when the fact becomes apparent to its officers that it will presently be unable to meet its obligations. When the transfer

“ under consideration was made such knowledge
 “ existed (though the officers might hope other-
 “ wise), and the *natural and probable consequence*
 “ of the transfer was a preference, and since every
 “ person is to be presumed to intend the natural
 “ and probable consequence of his own acts, there
 “ was a legal intent to prefer, and this cannot be
 “ rebutted by showing another motive.”

The exact condition of facts is this :

When the Schuster Hax mailed its cheque for \$2,000—on the *eighteenth*—the Capital National was in *contemplation* of insolvency—that is to say, its assets were but *five and one-half per cent.* of its liabilities.

And it had committed an *act of insolvency*—that is to say, its cheque for \$5,000 had been dishonored two days before and protested one day before (R. 19).

When the Packer's Bank mailed its remittance of \$5,000 and the Capital National its two remittances of \$815.79 and \$2,935.60—all on the *nineteenth*—the latter bank had committed *another* “act of insolvency.” The Chemical had dishonored another cheque of \$5,000 on the *eighteenth* (R. 21).

And of course the Chemical not only knew it, but it knew that it had *not* occurred through either “oversight or accident,” since it had on those days received money sufficient to meet the cheques (R. 18). And the conclusion is thus irresistible that it knew of the insolvency.

This is what the court below has overlooked—its opinion expressly stating that no *act* of insolvency had been committed, and distinguishing the cases on that ground.

It is certain that the sending the monies resulted

in a preference, and after the first cheque had been thrown out the officers of the Capital had no right to suppose that any others would be paid.

The decree should be reversed.

EDWARD WINSLOW PAIGE,
Of Counsel.



N^o 242.

U. S. DISTRICT COURT OF S. D. N. Y.

MAR 14 1899

JAMES H. NEKENEY,
Clerk.

Brief of Yeaman for Appellant.

Filed Mar. 14, 1899.

Supreme Court of the United States.

No. 242. OCTOBER TERM, 1898.

KENT K. HAYDEN, AS RECEIVER OF THE CAPITAL
NATIONAL BANK OF LINCOLN, NEBRASKA,

Appellant,

against

CHEMICAL NATIONAL BANK,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR APPELLEE.

GEO. H. YEAMAN,
GEORGE C. KORBÉ,

Counsel.

IN THE
Supreme Court of the United States.

NO. 242. OCTOBER TERM, 1898.

KENT K. HAYDEN, as Receiver
of the Capital National Bank
of Lincoln, Nebraska,
Appellant,

AGAINST

CHEMICAL NATIONAL BANK,
Appellee.

BRIEF FOR APPELLEE.

Statement.

The bill in this cause was brought by the complainant, as Receiver of the Capital National Bank, to recover of the defendant, the Chemical National Bank, certain sums of money remitted, as payments, by the Capital National Bank to the Chemical Bank (R. 1-2). The Capital National closed its doors at the close of business hours on Saturday, the 21st day of January, 1893, and the bill alleges that from June, 1884, to the 21st day of January, 1893, it "was engaged in the business of banking" (R. 1). The bill then proceeds to allege that on that day the bank

was insolvent; that on the 22d day of January, 1893, the Comptroller of the Currency was satisfied of the insolvency of the bank; that on the 6th day of February, 1893, a receiver was appointed; that the insolvency of the bank was known to its officers; that there were extensive dealings between the two banks; that the defendant, on and after January 21, 1893, refused payments of all drafts made upon it by the Capital National; and that since the 22d day of January, 1893, the defendant has received certain sums of money "belonging to and for the account of" the Capital National Bank. The sums specified amount to \$11,486.39.

Section 5242 of the U. S. Revised Statutes, is the only authority for bills of this character. But the bill nowhere alleges "an act of insolvency" nor that the payments were made "in contemplation of insolvency," nor that they were "made with a view to prevent the application of its assets," as provided by law, nor that they were "made with a view to the preference of one creditor to another."

The defense is that the Capital Bank, being indebted to the Chemical Bank, made these remittances and payments on account of such indebtedness, and that they were so made by the Capital, and received by the Chemical in the usual course of business (Answer, R. 5). The pleadings and the evidence show an active course of dealings between the two banks. The account rendered by the defendant in the course of its dealings with the Capital Bank and put in evidence by the complainant (R. 9-19), opens with a debit against the Capital National of \$49,388.51, and closes with a balance of \$13,317.94 against the Capital National. This is after crediting the Capital National with all the payments (R. 18-19) now sought to be recovered back by the Receiver, so that, without those payments, the balance in favor of the Chemical against the Capital would be \$24,804.33 on January 24, 1893.

For the purpose of the hearing of this cause, in the

Circuit Court, it was stipulated that the proofs filed in the cause of Kent K. Hayden against George G. Williams and John E. Dodd might be used in this cause, subject to all legal objections taken when the witnesses were examined, and subject to any additional objections that might be interposed at the hearing, except the objection that the books of the Capital Bank were not put in evidence, and all objections may be urged at the hearing without previous motion or order to settle or suppress (Stipulation, R. 9).

The Receiver was the principal witness, and his evidence is mere opinion and not a statement of facts.

He speaks as of the time when he was testifying, long after the suspension of the Capital National Bank.

It only shows what the Receiver thought the securities were worth when he testified, without showing as fact what they were worth when taken, or that the bank ever knew they were worth less than par.

It does not tend to show that the debts were not perfectly good when contracted, nor does it show that the borrowers were not then solvent, and the securities not then good.

Instead of facts, the *opinion* of the witness is elicited as to *past* transactions, that opinion being based wholly on his *present* opinion of assets, without any knowledge of *facts*, as they existed when loans were made, and without having legally proved, by judgment and execution, that present holdings were not collectible.

It does not prove, nor tend to prove, that the bank knew the borrowers were not solvent, or the securities not good, when the loans were made.

Even if the borrowers were then insolvent and the securities bad, it does not prove or tend to prove that the bank knew it.

The force of these objections is well illustrated by the witness himself when he says : " I do not know

the value of the notes at the time they were discounted by the bank " (R. 60), which refers to notes described at pages 26-28. And see the Receiver's testimony that up to the closing of the bank: " These gentlemen and each of them were considered worth from \$100,000 to \$250,000 " (R. 64.). In the light of such evidence as that, the mere fact that the bank was *mistaken*, and could not collect the obligations of those men, instead of showing a contemplation of insolvency, shows exactly the contrary.

At pages 32, 35, 39, 40, 52, 56 and 58 of Record transactions and entries are elicited varying from three to ten years before the Capital Bank failed.

It is impossible, in the nature of the banking business, that such things, or anything, done in 1883, 1884 and 1885, as between the Capital Bank and parties other than the Chemical Bank can show, or tend to show, any intent on the part of the Capital to prefer the Chemical, and to make that preference in contemplation of insolvency in 1893.

The opinion of Circuit Court (WHEELER, J.) dismissing bill is found (R. 116-118), and the opinion of the Circuit Court of Appeals (R. 121-124).

POINTS.

I.

The bill of complaint should have been dismissed for want of equity, *there being no allegation of any act of insolvency, nor contemplation of insolvency, nor of intent to prefer, nor of intent to prevent the application of assets.*

When there is in the record any sufficient ground to sustain the decree below, it will be affirmed whether the reasons given by the Court below be sufficient or not.

The clause of the National Bank Act (Section 5242, U. S. Rev. Stats.) under which complainant seeks to recover is as follows: "All transfers of the notes, bonds, bills of exchange, or other evidence of debt owing to any national banking association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made *after the commission of an act of insolvency*, or in *contemplation thereof*, made *with the view to prevent* the application of its assets in the manner provided in this chapter, or *with the view to the preference of one creditor to another*, except in payment of its circulating notes, shall be utterly null and void."

The mere fact of insolvency, if it existed at the time of the transfer, is of no consequence whatever. A bank may be insolvent and the directors or the officer making the payment or transfer may not be aware of the insolvency. Or, it may be insolvent and the directors and officers may all know that fact, and yet honestly make the payment or transfer in the reasonable and honest hope of continuing business. So that insolvency coupled with knowledge of insolvency is not sufficient to sustain a recovery.

Two facts must concur:

I. —The payment or transfer must be made "after an act of insolvency, *or in contemplation thereof*."

II. —It must also be made "with the view to prevent the application of its assets * * * or with the view to the preference of one creditor to another."

Making the payment or transfer after an act of bankruptcy, or after the contemplation of bank-

ruptcy, is not sufficient. It must also be done for the purpose either of preventing the application of its assets, as provided by law, or to prefer one creditor to another. There must be an intended preference made after the act of bankruptcy, or in contemplation of insolvency. We say *intentional* preference, because the mere fact or subsequent *event* that the payment or transfer *results* in a preference, or in preventing the statutory application of the assets, is immaterial. The words "with the view" mean with the deliberate intention. Without such intent at the time of the payment or transfer it is not unlawful, and the fact that a preference has resulted cannot have relation back, and make the payment unlawful when made. Neither can the intent be inferred from an *act* of insolvency, much less from the mere fact of actual insolvency. The intent is a fact to be affirmatively proved.

The presumption of law is always in favor of the regularity and the legality of official conduct. The contrary must be both alleged and proved. If an act of insolvency occurring after the payment or transfer may be taken as sufficient proof that the insolvency was at the time known or contemplated, and if from this *inference* we may *further infer* the intent to prevent the application of assets, or to prefer a creditor, *then every payment made by a national bank is received at the hazard of having restitution enforced by a future receiver* should it be *thereafter* discovered that the paying bank was insolvent *when* the payment was made. The Statute of Limitations would be the only bar, and its application is uncertain. It was not the intention of the law to have all payments and transfers by national banks hung up indefinitely for future investigation of the past condition of the paying bank, and for the operation of inferences of intent, without further proof. Such an incubus, such a vast unknown contingency, constantly hanging over the banking business, would be wholly intolerable.

The principal contention of counsel for complainant is that the Capital Bank had been insolvent for some time before the payments now in question, and that the bank's officers must have known the fact. If the insolvency were admitted the alleged or inferred knowledge of the fact would not follow. Many banks and firms have in good faith and reasonably believed they were solvent, and could continue in business, when the event has proved they were not, and that it would have been better for all concerned if liquidation had been sooner commenced.

It cannot possibly be contended that there was any "act of bankruptcy" by the Capital Bank prior to the payments mentioned in the bill. They were all remitted by that bank, or by it ordered to be remitted by other banks, before it closed.

Can its closing a few days after the remittances were made, or ordered to be made, be held, *per se*, proof of a *contemplation of bankruptcy at the time* the payments were remitted or ordered to be remitted? Nothing is more familiar to the business world, so familiar that courts may take judicial notice of it, than the suddenness with which honest and discreet bankers and business firms sometimes discover their insolvency and that the business cannot be continued. The operations of a day or an hour may disclose the fact. A telegram of three words, touching a single asset which has been relied upon, may precipitate the crisis and force the conclusion that suspension is the only honorable course left.

It does not devolve on the Chemical Bank to prove that the Capital Bank was acting reasonably, honestly or lawfully. The burden is on the complainant to prove unlawful conduct, to prove certain facts and certain acts, accurately described in the statute. Nor is this enough. He must go further *and prove the motive, the unlawful intent*, with which those acts were done.

"The term 'insolvency' as used in this section,

has the same meaning it had in the national bankrupt law; that is, it does not mean an absolute inability to pay at some future time, upon a settlement and winding up of the bank's affairs, but 'a present inability to pay in the ordinary course of business.'"

Case *vs.* Citizens' Bank of Louisiana,
2 Woods, 23.

Such inability of the Capital National has not only not been proved, but is *disproved by the admitted fact that it conducted its business and paid all claims up to the hour of closing* (see Stipulation, R., 9).

The infirmity of complainant's contention is, that because, after these payments were made, there came a "future time" when the bank's "absolute inability to pay" became manifest, therefore it was unable to pay, and was insolvent when it did pay. It can better be said that the fact of payment shows ability to pay, and payment being actually made, the burden is on complainant to show two things, *contemplation* of insolvency and *intent* to prefer *when* the payments were made. Instead of *presuming* an unlawful motive, it would be far more natural and just to suppose that when the payments were made the Capital Bank fully believed it could go on in business, and afterwards discovered that it could not do so.

In *Hayes vs. Beardsley*, 136 N. Y., 299, the facts are stated as follows: Defendant (at that time a director of the bank) held three certificates of deposit bearing six per cent. interest. The cashier, learning that the other directors did not wish to pay so large a rate of interest, paid two of the certificates out of the "assets" of the bank. The other was paid in money, on presentation, to another bank, the holder. The bank at the time of these payments was in fact insolvent, and had been for years, but this was known only to the cashier; it

was in good credit and had committed no act of insolvency and paid all its obligations as they became due or were demanded, for six weeks after the last of said payments were made; just as the Capital Bank, by the allegations of the bill and the stipulated facts, is shown to have paid all claims presented up to closing the bank at the close of business hours on January 21, 1893.

The Court of Appeals, at page 303, say: "There was no *satisfactory evidence* that these payments were made by the bank to prevent the application of its assets in the manner prescribed by the National Banking Act, or with a view to a preference of the defendant over the other creditors of the bank."

This is a distinct judicial determination that something more must be shown than payment and insolvency at the time of payment. The *intent to prefer* must be affirmatively proved. In the case at bar such an *intent is not even averred in the bill*. It is averred that the bank was insolvent on the 15th day of January, six days preceding the closing of the bank, and that such insolvency was known to its officers and directors. If intent could be inferred from these allegations (the decisions are otherwise), yet even these allegations are not proved in the case at bar.

In *Hayes vs. Beardsley (supra)*, the New York Court of Appeals proceeds to say: "The circumstances under which the payments were made and the condition and credit of the bank at the time forbid the inference that the payments were made for such a purpose. The defendant was not selected as a favored creditor. *During all the years of the insolvency of the bank* all creditors were treated alike, and there was no preference of one over another. All its demands were met at maturity. *There does not appear from the facts found to be any better ground for claiming that these payments made to the defendant were void than there is for making the same claim in reference to the numerous payments made in the regular course of business by the bank*

to its customers during MANY MONTHS prior to the closing of its doors. In order to uphold a recovery in an action like this there should be some *satisfactory evidence* that the cashier or other officer actually paid the money of the bank *in contemplation of insolvency* for the purpose of giving a preference to the payee, and with a view to prevent the application of the assets of the bank to the creditors generally, as provided in the National Banking Act." * * * "The fact that the defendant, entirely ignorant of the insolvency of the bank, was a director, does not, under such circumstances, as matter of law, charge him with liability for the payments made to him" (p. 304). In that case not only was the defendant a director, which fact plaintiff contended charged him with notice, but besides this fact, payment of two of the certificates had been made to him mainly by the transfer of negotiable securities of the bank, only a small difference being paid in money (p. 301). This fact might have been held to indicate some solicitude on his part, and inability on the part of the bank to pay in money. But the Court held that there was no proof whatever of intent to prefer.

Has the complainant, as Receiver of the Capital Bank, sued the various depositors who had accounts with that bank, to recover the sums paid out on their checks between the 15th and 21st days of January? Those deposits were debts, and their payment, with intent to prefer, would be quite as subject to the operation of the statute as the payment of an indebtedness to the Chemical Bank, a lending correspondent. It is not even pretended that he has done so; but if this suit is well brought, then he is giving such depositors a "preference" quite as void and unlawful as the one he now tries to fasten upon the payments to the Chemical.

In *Robert vs. Hill* (23 Fed. Rep., 311, opinion by Wheeler, J.), the plaintiff was Receiver of a broken

bank and the defendant one of its depositors. "There was a run on the bank by depositors which alarmed them. He did not want his money, but wanted to be secure. The officers guaranteed his deposit personally, and turned out this note (bank asset) to *pacify him*. He was dealt with as any other creditor *equally importunate* would have been. There was no intent to favor him over others. Their motive was to retain the money. Had he received the money he would have been equally liable to refund that, as has been shown." * * * They were striving to save the bank and not to help him at the expense of others (p. 312). * * * "Their apprehension of the condition of the bank (*i. e.*, contemplation of insolvency), and *motive to prevent suitable distribution of the assets ought to be made to appear clearly* in order to justify going so far back as to the time of its pledge and opening all pledges and payments on past debts; and their purpose and acts are to be considered in view of what they could see *looking forward*, and not wholly by what is apparent now by *looking backward*. * * * The actual condition was *as good as it had been for some time*. They must have known that it was *perilous*, but do not appear to have lost courage or then to have expected failure. The evidence *does not satisfactorily show* that they were placing money and securities where they would be kept from the effect of failure, but rather does show that they were using their assets to prevent failure" (pp. 312-313).

The bill was ordered to be dismissed.

Upon a rehearing a different conclusion was reached (23 Blatch., 312; 24 Fed. Rep., 571) by Wallace and Wheeler, *JJ.*, but it was placed upon the ground that there had very recently been a severe run upon the bank; that the depositor knew this "*and was unwilling to allow his money to remain without security*" (p. 315), and that the depositor "*took the transfer with a view of obtaining a pref-*

erence over the other creditors of the bank" (p. 316). This seems to have been a controlling consideration; for the Court, at page 317, proceeds to say: "A case may be supposed where a bank is *hopelessly insolvent and is known to be so by its officers*, and where any payment made by it will, as they know, *necessarily result* in a preference to the person receiving it; and yet, if made in the *ordinary course of business*, as for instance, to a customer who, in ignorance of the condition of the bank, continues his dealings and makes daily deposits, and draws out checks daily, it would be extremely inequitable to compel the latter to pay it back. * * * But the transaction *on the part of McGregor* was not an ordinary one. It is extremely unusual for a depositor of a bank to demand security as a condition of allowing his money to remain." Judge Wheeler says: "Insolvency is not enough; the statute does not make transfers after insolvency void. There must be an act of insolvency, or such a state of insolvency, as an existing fact, as to make it apparent that the creditors cannot be paid in full, and that a distribution of assets among the creditors will take place." If an intent to prefer can be construed to be an act of insolvency, which has never been decided, then proof of such intent is wholly absent in the case at bar. The Chemical was no more preferred by these remittances several days before suspension, than were the depositors whose checks were paid an hour before suspension. It was all done in the usual course of business. All these elements, the run, the alarm, the demand, the putting off and the subsequent demand of security and obtaining it, are absent in the case at bar, which is one simply of remittances "made in the ordinary course of business." The remittances in this case were made *voluntarily* by the Capital Bank. The Chemical Bank was not urging, had not asked for payment, or remittances, or for security. And at page 315 it is correctly said: "Insolvency as ordinarily defined, is that condition of affairs in which

a merchant or business man is unable to meet his obligations as they mature in the usual course of his business. An act of insolvency takes place when this state of affairs is demonstrated, and the merchant *has actually failed to meet some of his obligations.*" That is just what had occurred in that case, while nothing of the kind ever occurred in the present case. That case, as finally decided, is no authority for the complainant here.

See also to same effect:

Dutcher v. Importers and T. Bank, 59 N. Y., 5.

Utley v. Smith, 24 Conn., 310.

Tiffany v. Lucas, 82 U. S., 410 (21 L. Ed., 198).

National Bank vs. Colby, 21 Wallace, 609, involved only the validity of an attachment, and has no application to the present case.

Nor is there anything in the National Security Bank vs. Butler, 129 U. S., 223, contrary to the position now contended for, or that in any degree sustains the complainant's bill. In that case there was a transfer of assets to a creditor "*after* the directors " had voted that the bank should go into liquidation, and should be closed, and that a receiver " should be appointed." If that did not show an intent to prefer, it clearly did show an intent to prevent the transferred assets from coming into the hands of the Receiver. Nothing at all similar to this was done in the case at bar. On the contrary, the Capital Bank continued to pay all demands, as usual, after these remittances were made, and all of the remittances to the Chemical Bank were made in the usual course of business some days before the Capital Bank was closed, and not an asset was touched or remitted after it closed.

II.

The Circuit Court of Appeals affirmed the *dismissal on the merits*. The decree was right, even had the bill been good on its face.

The suit of Hayden against Williams and Dodd, the evidence in which, subject to objections, is used in the case at bar, was to recover *dividends*, previously paid by the Capital Bank to *stockholders*, upon the ground that they were paid out of capital, and not out of earnings. In the present case the object of the bill, and the issues, are entirely different. In this case the bill is by the Receiver of the suspended Capital Bank to recover back from the Chemical Bank *payments to a creditor* made by the Capital Bank before suspension. Plaintiff can recover only upon the ground that the payments were made, either after an act of insolvency, or in contemplation of insolvency, *and* with the intent to prefer that creditor, the Chemical Bank. The wide difference between the two cases is easily perceived.

In the case at bar there is not only no "act of bankruptcy" either alleged or proved, but there is no attempt to prove it. Not only did the bank continue its ordinary business up to the close of banking hours on January 21, 1893, but there is not even a suggestion that it had failed to pay any depositor on demand, nor that any obligation of that bank had been protested, or not met at maturity. The fact that on the 17th January, 1893, one of its *own drafts* on the Chemical had not been honored is no act of bankruptcy. It was not a draft on the Capital, nor any promise by that bank. It was simply a request for a further advance, in other words, to borrow money, which was declined by the Chemical. The transaction is entirely consistent with the absolute solvency of the Capital Bank. It has never been held that the failure of a trader or a bank to obtain credit and accommodation was an

"act of bankruptcy," nor any proof of insolvency or contemplation of insolvency. There being no act of insolvency in the case, there can be no recovery by the plaintiff, without a finding that the payments to the Chemical Bank were made in contemplation of insolvency and with an intent to prefer the Chemical.

III.

The attempt in this case is to base a recovery upon the following alleged facts and inferential reasoning: (1) The Capital Bank was insolvent when the payments were made; (2) the officers of the bank knew it was insolvent, because they *ought* to have known that fact; (3) the payments being made with such knowledge, were made in contemplation of insolvency, and (4) being made in such contemplation, they were made with intent to prefer.

Counsel for defendant has here attempt to state the Receiver's case fairly and has stated it as strongly as he knows how to do. If there is only one break in the four steps of assumed facts, and the inference to be drawn therefrom, the complainant has no case.

(1.) The whole aim of the proofs is to show bad management of the bank and to show dishonesty of the bank's officials as between themselves and the bank. If the bad management and dishonesty be admitted, yet it may safely be affirmed that insolvency is not proved at any particular time, prior to closing, except in the light of subsequent events and facts *a light thrown backwards upon an actual condition then existing but not then known*. In the same way all the best trust companies and savings banks are insolvent to-day, if future developments

should show that the United States Government and many of the principal cities and railroads, whose bonds those institutions hold, *are now* insolvent, though not now known to be so.

(2.) If the Capital Bank was actually insolvent *when* these payments were made to the Chemical Bank, there is not one particle of evidence in the whole case to show that, as matter of fact the officers of the bank *knew* it was then insolvent. An inference, an argument they "ought to have known," do not meet either the requirements of reason or of the law.

(3.) Therefore the whole argument that the payments were made in contemplation of insolvency falls. What is "contemplation" as used in the statute? Is it contemplating, in the sense of considering, a seen and known fact? Or is it expecting, foreseeing and fearing that fact will occur in the future? If either sense be sufficient, then as between a bank *discovered* to be insolvent on the 21st of January, and a creditor, whose payments were remitted before that time, every legal presumption should obtain that officers have discharged their duty, and did not *know or believe* that they could not continue the operations of the bank until they actually closed it at the close of business hours on the 21st. Nothing but the strongest and most convincing proof should require an honest creditor, once paid, to refund the money, because of a state of facts, indeed a *state of mind*, which the creditor did not cause and could not control.

(4.) Equally falls the inference that if there was a "contemplation" of insolvency, the payments must have been intentional *preferences*. The law requires *both* the contemplation and the intent to prefer. If one were sufficient, the law would have named but one. There may be contemplation, in the sense of fearing, having reason to believe a thing

may happen; and yet there be both the right and the duty to avoid and struggle against, to prevent the impending possible calamity. There could be no better illustration of this than the case in hand. The account of the Capital Bank with the Chemical was overdrawn. It had received large accommodations from the Chemical. Being indebted to it was a sufficient reason and justification for the remittances. But the Capital, at the same time, *and up to and including the day of closing, was drawing against the Chemical a great many drafts, some of them in considerable sums. These were for further advances. What is the inference from this conduct? Simply an intent to continue business. The remittances were not preferences. They were payments on account, on an indebtedness already existing, and if made also to maintain credit and in the hope of further advances, yet a mistake of plan or calculation, a failure to accomplish the desired end, is not an offense against the statute. There must be not only the "contemplation," but the "intent to prefer" an existing creditor.*

IV.

The complainant, in the case against Williams and Dodd, as shareholders, to recover dividends, sought to recover all that had ever been paid to them, and in the attempt to sustain that claim took proof to show the condition of the Capital Bank almost from the beginning. Thus at page 40 of Record: "Q. So, Mr. Hayden, at the end of the first year the Capital National Bank had about half of its capital stock wiped out by these losses to which you have testified? A. Yes, sir." Assuming this to be true, and that the impairment of capital was never made good, though that fact is not proved, and assuming that the bank was

insolvent through the whole ten years of its existence, and assuming that the law conclusively infers that all payments made by an insolvent national bank were made *with an intent to prefer*, we have a condition of affairs that would make all dealings with any bank, at any time within the Statute of Limitations, depend upon the hazard of its going into the hands of a Receiver at some future time, and the payments being declared invalid, ripped up and ordered to be refunded. And the rule would apply as well to depositors as to corresponding banks which had afforded accommodations. Every depositor is as much a creditor, a lender to the bank, as another bank which makes an advance. Such a liability on the part of creditors to refund money paid to them in the ordinary and regular course of business, is not and cannot be the law. Every payment made to alarmed depositors, the bank hoping to pull through, would have to be refunded if the bank finally suspended under a run upon it. The heading, or syllabus, of Point I., of brief of learned counsel for appellant, is: "*After the Comptroller of the Currency, through his examiner, had taken possession, no creditor could keep anything.*" With the addition, "paid after such possession," or, "paid after the suspension," this would be good law. But under the contention of appellant it is good law just as it stands. "No creditor could keep anything," no matter how long ago paid, upon the subsequent discovery that the bank was insolvent *when* the payment was made. The proposition is too intolerable for discussion.

For the same reason the kind of testimony found at pages 30-31, even if true, is entirely irrelevant. The witness is testifying in 1895 that notes given in 1890, 1891 and 1892 "were worthless at those times." That might be perfectly true, in the light of subsequent events, and yet not known to be true when the notes were taken. And even if it were proved that the officers of the bank knew they were worthless when taken, the fact would

have no tendency to prove an intent to prefer the Chemical Bank in 1893. The evidence, if available for anything, further illustrates the wide difference between a claim, like this, against an *actual creditor for money loaned*, and a claim for the recovery of dividends, upon the ground that they had not been earned; in other words, illustrates the irrelevancy of all the evidence found in the suit of this complainant against stockholders of the Capital Bank.

V.

The last point leads to the further observation that if the evidence establishes any claim against the Chemical Bank, it also establishes claims against so many others, and in such large amounts that the Chemical Bank could not be sued alone, and would not in equity be required to respond alone. The bill of complainant alleges that the Capital Bank conducted the banking business up to the date of its suspension, the closing of its doors on Saturday, January 21, 1893. The stipulation admits the same fact (R., 9). And at page 100 the complainant has put in evidence a tabulated statement (Exhibit 68), showing "a few" who were creditors of the bank continuously from January 10, 1888, to January 21, 1893, when it closed. How many more there were is not stated. These were only "a few." That the schedule is not a full statement is shown by the omission of one depositor of \$26,105.80 (R., 65). It is difficult to see the object of this proof on the part of complainant. It shows a bank in good standing, its deposits not diminishing (and upon that point see also abstract of official reports from February, 1891, to December, 1892, Exhibit 59, p. 99 of R.); a bank well and reasonably fit to be trusted and accommo-

dated by other banks. And that the "creditors" named in the Exhibit 68 were *depositors* is shown by the statement. "These accounts were principally book accounts. * * * The tabulated statement (Exhibit 68) *only* refers to book accounts or open accounts. These various individuals shown here on this tabulated statement *kept checking against this account right along at various times * * * checking and depositing*" (R., 64). Without this evidence the Court would judicially know from the allegations of the bill (R., 1-3) and from the stipulation (R., 9), that in "conducting the banking business in the ordinary and usual way" up to the close of business hours on January 21, 1893, it was constantly receiving and paying out deposits, as well as paying creditors who were not depositors, and even discounting paper.

Now, if the evidence shows any claim whatever against the Chemical Bank, it shows an equally valid claim against *all creditors who were paid anything, embracing all depositors who checked against their deposits*, during the period of insolvency, whether that period was long or short, and equity will not tolerate that this defendant, The Chemical Bank, should be singled out and compelled to repay *in full* the sums of money mentioned in the bill. If any claim, or shadow of a claim, is established, which is emphatically denied, then equality being equity, the first principle of equity jurisprudence would require that *all*, that is, *all who had been paid anything whatever while the Capital Bank was insolvent, should contribute ratably to make up a sum sufficient to pay all outstanding debts of the bank at the date of its suspension*. That is, they must contribute to make up any deficiency that remains unpaid, after applying the assets of the bank and the call upon stockholders for the par of their shares. It is true this would lead to a curious result. It would be making all those, including depositors, who had been paid the day of suspension, or one

day or a month or a year or even six years before suspension, to contribute, by *repayment*, enough to make *entirely whole* all those who had the *good fortune* to be creditors or depositors *at the date of failure*. But the theory and the reasoning of the complainant, and not the theory and reasoning of the defendant, must be held responsible for such a unique result. All that is now insisted upon is that if the complainant's evidence shows any right to relief, it is a relief against so many who ought to bear the burden ratably that equity will not allow the defendant to be singled out for a recovery *in toto* instead of *pro rata*, the amount to be ascertained by a general accounting and contribution.

The account between the parties to this suit was an active one, the dealings rapid and numerous. This is fully shown by the proof the complainant has given, the account for the month of January, 1893 (R., 9-19), and the statement or schedule of the numerous drafts of the Capital *not paid* by the Chemical (R., 20-21), and therefore not entering into the account at pages 9-19.

It will be seen from the account that the sums now claimed, amounting to \$11,486.39, were all received by the Chemical on January 23 (R., 19) though all were remitted before the Capital Bank had suspended.

VI.

By the stipulation (R., 9) it will be seen that the usual mail time between Lincoln and New York is 50 hours and 45 minutes; between Lincoln and South Omaha, 2 hours and 40 minutes; between South Omaha and New York, 48 hours and 37 minutes; between Lincoln and St. Joseph, 7 hours and 28 minutes; and between St. Joseph and New York, 50 hours and 55 minutes. This is based on

information derived from the P. O. Department, and of course means actual running time from station to station.

If in the case of direct transit from Lincoln to New York we allow only 12 hours for preparation of mail matter, deposit in mail and making up mail at Lincoln, and distribution and delivery at New York, we have two days, 14 hours and 35 minutes as the *business* time between Lincoln and New York, or 62 hours and a half instead of 50 hours and a half.

All of the sums claimed in the bill, \$2,935.60, \$815.79, \$735, \$5,000, \$2,000, seemed to have been received by the Chemical Bank and placed to the credit of the Capital Bank, on January 23, 1893 (R., 19). The first three sums named were sent direct by the Capital Bank January 19th, 19th and 20th respectively (Exs. R., 22, 115-116).

As to the remittance of \$5,000 by the Packer's National Bank from South Omaha, we have their letter of advice (R., 22), dated January 19th, and if we allow but one day for making, mailing, transmission, receiving and acting upon, the order of the Capital to the Packer's to make the remittance to the Chemical, then the order of the Capital could not have been mailed later than the 18th, three days before suspension, and it may have been some days earlier.

And so with the \$2,000 remitted by the Schuster Hax from St. Joseph. The letter of advice (fol. R., 22), is dated January 18th, and the direction of the Capital to the Schuster Hax to remit to the Chemical could not have been mailed later than the 17th, four days before suspension, and may have been several days earlier.

These estimates of time are made in view of the contention in the next succeeding point as to when these remittances vested in the Chemical Bank.

And the matter of time is material, not merely upon the question of vesting title, by delivering into

the United States mail, but is equally important upon the question of intent to prefer. The account (R., 9-19) shows that for some time the account of the Capital had been overdrawn. It was still drawing at the date of these remittances now in dispute. It obtained credit for \$10,809.32 "discounts" as late as January 14th (R., 18) and apparently for \$12,059.40 as late as the 20th (R., 18).

According to a schedule put in evidence by complainants the drafts of the Capital on the Chemical, not paid by the Chemical, amounted to \$44,264.66 (R., 20, 21). These were being drawn up to the day of suspension, nine of them being dated the 21st and thirteen on the 20th. Remittances were also being constantly made, among them those now reclaimed by the Receiver. The facts, instead of indicating an intent to prefer, point unerringly to the intent to continue the business of the bank. The intent to prefer is disproved by the fact that if all drafts of the Capital had been paid, the balance in favor of the Chemical would have been increased by \$44,264.66, or raised to \$57,582.60, instead of \$13,317.94. The motive for remittances, aside from the always proper one--of paying or reducing an indebtedness--is found in the fact of the desire to obtain further advances, the desire to preserve credit with the Chemical, the endeavor to pay everybody. An error of judgment on this point must not be construed into an intent to prefer, nor an act of insolvency, nor as payments made with intent to prevent assets from coming to the hands of a receiver. This view receives striking confirmation by an analysis of the schedule of unpaid drafts. By reference to the "date of issue," it will be seen that they range from December 5, 1892, to January 21, 1893, several being on the very day of suspension. By reference to the "date of protest," it is seen that they were nearly all refused payment *on the 23d, or some days afterwards*, each as presented, in strict compliance with the Examiner's telegram, *received*

on the 23d, to pay no more drafts. On this state of facts an argument is based that the Chemical Bank should be compelled to refund *payments* mailed to it *before* the 21st, the day of suspension, and received on the 23d.

VII.

Title vests by deposit in United States mail.

The deposit of the drafts or checks in the post office, to be carried to the Chemical Bank, was such a delivery as to vest title in that bank.

Johnson vs. Sharp, 31 Ohio, 611,

where it was held that the deposit of an assignment in the post office, in Missouri, addressed to the assignee in Ohio, passed title to such assignee, from the time of such deposit as against subsequent attaching creditors. To the same effect are

McKinney vs. Rhoads, 5 Watts (Pa.), 343.

1 Randolph Com. Paper, Sect. 218.

Kirkman vs. Bank, 2 Caldwell (Tenn.), 397.

1 Danl. Neg. Inst., Sect. 67.

Mitchell vs. Byrne, 6 Rich. L., 171.

This rule, that deposit in the mails divests the sender of all title, and vests full title in the person to whom the letter is addressed, is so strict and controlling that if it may be inferred from the facts that an agent or debtor had the consent of the principal or the creditor to remit *money* by mail, its loss in the mails, by theft or otherwise, falls upon the person to whom it was thus sent.

Buck vs. Chapin, 99 Mass., 594.

Morgan vs. Richardson, 13 Allen (Mass.), 410.

Even in criminal prosecutions, where the thing taken from the mail is described as the property of the person to whom it had been sent, but who had never received it, the charge in the indictment is held to be well laid.

United States *vs.* Jackson, 29 Fed. Rep., 503.

United States *vs.* Jones, 31 Fed. Rep., 725.

In a late Wisconsin case it was held that a bank which, at its customer's request, mails its own draft to the customer's creditor in payment of the creditor's draft on him, cannot defeat the creditor's right to the bank's draft, by intercepting it in the mail, although it extended credit for the amount of the draft to its customer in ignorance of the fact that he was insolvent.

Canterberry *vs.* Bank, 30 Law Rep., Annotated, 845.

In that case the bank succeeded, by the use of the long-distance telephone, in recovering its letter and draft before they were delivered, and destroyed them; but the payee, to whom the draft was addressed through the mails, and who had never received it, succeeded in his action against the bank for the amount of the draft; and this, upon the principle that title vested in him the moment the letter contained in the draft was deposited in the post office.

In Pratt *vs.* Foote, 9 N. Y., 463, a bank's debtor offered, in payment of his note, nearly due, a check drawn upon the bank by one of its own customers; the bank declined to accept the check as payment, but consented to retain it and apply it to the note, if the check were made good on the day the note fell due. On that day a balance appeared against the drawer of the check; but soon after, new credits having been made to him, the bank charged the check in his account, and credited

the note as paid. This transaction was held to operate as an absolute payment of the note. The Court held that such entries upon the books of the bank were of precisely the same effect as if the money was first paid to the payee of the check, and instantly repaid to the bank.

By a parity of reasoning, when the Capital National Bank in Nebraska sent an order by mail to a distant correspondent, to remit to the Chemical Bank, for credit and account of the Capital, and such correspondent did so remit by mail and the Chemical Bank received such remittance and placed it to the credit of the Capital Bank, the transaction is the same as if the correspondent, *on the date of the order*, had paid the cash to the Capital, and the Capital had instantly paid it to the Chemical.

VIII.

An important case, directly in point, has been decided by the Michigan Supreme Court, since the decision of the Circuit Court in this case. The statute of Michigan, upon which the plaintiff sought to recover, is substantially the same as that of New York and of Section 5242 of U. S. Rev. Stats.:

“All payment of money, either after the commission of an act of insolvency or in contemplation thereof, with a view to prevent application of its assets in the manner prescribed in this act, or with the view to a preference of one creditor over another, shall be held to be null and void.”

The Receiver of a broken savings bank sued a depositor to recover the amount paid him. The Judges of the Supreme Court delivered separate opinions. Judge Moore said: “Not only must there be an act of insolvency, or a contemplation of

insolvency, but the payment must be made with a view to prevent the application of the assets of the bank in the manner provided by the act, or the payment must be made with a view to the preference of one creditor over another" (p. 677).

Judge Grant said: "The record shows no refusal to pay any depositor who presented a check. Mr. Bradley (the cashier) did no more than to urge certain depositors to withhold their demands" (p. 678). There is no proof that the Capital Bank ever failed to pay a check, and none *that it urged any depositor to withhold his demands.*

"It is not sufficient that the payment *did operate as a preference.* There must be the actual commission of an act of insolvency, or the payment must be made in contemplation of insolvency, or with the intent to prefer" (p. 678).

Judge Hooker said: "We may reasonably say that the words 'with a view to' mean with the intent or design of pursuing a particular course, and that this intent or design means the intent of the bank or officers making the payment, and not the recipient of the payment" (p. 678). The learned Judge then states the argument of plaintiff's counsel that the conduct of the cashier during the run on the bank, paying some and persuading others to withhold their demands, and finally closing the doors of the bank when he found that he could not stem the tide, had the effect to prevent the application of the assets of the bank in the manner prescribed by law, and to prefer such creditors as were paid to those who were not; that the cashier necessarily knew this; and that it necessarily follows that the payments were made with such intent or view, and consequently the payment was recoverable under the statute. After pointing out that such reasoning would invalidate every payment subsequently made, no matter how long a period intervened between such refusal and closing of the bank's doors, even if the bank had pulled through and continued in business, the Judge points out this curious result: "A man

who was turning over a small capital by depositing daily and drawing in the course of his business might become liable to the bank for an amount several times as large as the sum that he was actually using in his business" (p. 679). The case was a much stronger one for the plaintiff than the case at bar, for there was a heavy run on the bank, and persuasion was used to induce depositors not to urge their demands; elements absent from the case in hand, with the additional fact in this case that the Capital Bank actually went on *paying depositors for four days and more after the remittances had been made to the Chemical Bank.*

Judge Hooker, in the case cited, adds: "It must at least appear that there was a specific design to accomplish one of the objects mentioned, viz, to favor a particular creditor, or to withdraw its funds from the control of the law, and that it is not enough that we shall be able to say that the effect of the act was to prefer the creditor, or to so withdraw the amount paid—facts which are in themselves *incidental and self-evident*" (p. 679).

Stone v. Jenison, 36 Law Rep., Ann., 675.

So, an insolvent corporation, by mortgaging its property to raise money to pay its debts does not create any illegal preference.

Jones on Corporations, § 23.

Bergen v. Porpoise Fishing Co, 42 N. J. Eq., 397.

IX.

The learned counsel for appellant assumes that the Examiner's telegram to the appellee was received before the close of business on the 23d January. The point is immaterial.

The only account we have of the telegram is at R. 114. It requested the Chemical "not to pay any drafts." And Mr. Quinlan was of the impression that it "did not state when the Capital National Bank suspended, nor when the Bank Examiner took charge of it."

Presumably the Examiner made his information and his directions as full as he desired them to be, as full as would be useful and as full as his legal duty required. He directed that *no more drafts be paid*. But the Examiner makes no objection to, or reclamation of, *previous remittances to the Chemical*, which were before his eyes on the books.

Counsel for appellant contends that: "If the checks had been deposited in the mail *pursuant to any agreement* * * * the case would be very different." The proof shows, and the Court will judicially know, that the mail was the accustomed means of communication between the two banks. That accustomed course of business amounted to an agreement that payments might be so remitted. Therefore, upon concession of counsel for appellant, title passed upon deposit in the mail.

The attempt to divide the Chemical Bank into two characters, one of *agency* and one of *creditor*, is wholly futile. The Capital was constantly indebted to the Chemical. All remittances were sent to it as payments. The deposits were simply entered on the credit side of the account. No instance is shown of *collection and remittance* by the Chemical. It frequently extended credit, and that credit was drawn against by the Capital. The suggestion that: "What the Capital could do the Bank Examiner of course could do, and the law has done it for him as a consequence of his taking possession," is open to several answers. (1.) It assumes the right of a remitting bank to intercept or withdraw the remittance after deposit in the mail. No such right exists (*Canterberry vs. Bank*, 30 Law Rep., Ann., 845). (2.) That "the law has done it for him as a conse-

quence of his taking possession," is begging the whole question. The law put under the control of the Examiner, and vested in the Receiver, whatever had not been lawfully disposed of. The question here is, Were *all* previous payments *void*?

X.

The suggestion that the item of \$833.64 should be allowed, because "there is not a particle of proof that it came by mail," would leave a strong implication that those which did come by mail should *not* be allowed to complainant. As no other means of transmission has been shown, and constant remissions by mail are shown, this one will be presumed to have been by mail until the contrary is shown. The complainant had access to the books of account, and letter press copies of the suspended Capital Bank, and cross examined the cashier of the Chemical, and made no attempt to prove any other mode of transmission of the item of \$833.64.

The bill is for the recovery of specific items named *and makes no mention of this item of \$833.64.*

The brief of counsel for appellant assumes that this item of \$833.64, should be allowed because the Chemical Bank has not proved how and when it was remitted. The account shows it was received and placed to credit of the Capital on the 24th (R., 19), three days after suspension, two days after the Examiner took possession. We submit that the burden is on the appellant to show his title to the money. And that burden is increased, if possible, by the frame of his bill. He specifies distinctly five several, separate sums which he claims (Par. VI. of Bill, R., 3). - No mention is made of the item of \$833.64. No better plan could have been devised to throw the defendant off its guard, if the burden be

on the defendant to prove title to money in its possession.

The complainant must prove his title to that, as to all other sums claimed. He has given not a word of direct evidence on the subject. He simply finds the item on an account rendered by the Chemical to the Capital Bank, and puts that account in evidence and claims the money, because the Chemical has not shown when, how, and by whom it was remitted.

The record shows remittances by letter (R., 22, 115-116). The Court would, without proof, judicially know that the mail is the accustomed mode of correspondence and transmission between banks. The record shows that the Capital frequently ordered other banks to remit to the Chemical. Thus nearly all the *credits* on pages 17, 18 and 19 of the Record show remittance by banks other than the Capital. As this required an order or direction from the Capital, the time between the order and the receipt by the Chemical would be more than three days. This would, of course, require more time than a direct remittance from the Capital. The record shows that three days is the shortest business time between Lincoln and New York. At pages 20-21 there is a list of 66 drafts of the Capital not paid by the Chemical. Each has a "date of issue" in one column, and a "date of protest," on another column. The dates show that nearly every one of these protests were made in obedience to the Examiner's telegram received on the 23d. It must be borne in mind that the Capital Bank suspended at the close of business hours on Saturday 21st. Examiner took possession on Sunday 22d. Monday was 23d. Appellant's brief states that "before the close of business on the 23d the appellee was informed by telegraph by the Bank Examiner that he was in possession of the concerns of the Capital Bank, and that it, the appellee, *must pay no more drafts.*" Mr. Quinlan, cashier of Chemical, says the telegram was received "before leaving the

bank on Monday, January 23d " (R., 114), a form of expression indicating after business hours. The order was to pay no more drafts. Placing to credit of the Capital, on the 24th, a remittance mailed by the Capital, or some of its correspondence, some days before the 21st, was not paying a draft.

Now recurring to the schedule of protested drafts, it is found that with the single exception of the request for further advances, they were protested on dates varying from January 23d to March 27th. By comparing the dates of protest with the dates of issue, it is seen that *only five* out of the 66 were protested on the *third day after issue*. Most of the others range from four to seven days after issue, a few of them being several weeks after.

The complainant thus, by his own exhibits, proves that *three days is the very shortest business time* between Lincoln and New York, and that it is usually much longer.

If the Capital remitted the \$833.64 direct, on the morning of the 21st, the day it suspended, but while in full operation, the Chemical could not have received it earlier than the 24th. But if remitted by some other bank, at the request of the Capital as in so many other cases, such order was given by the Capital some days *before* the 21st. And title vested on mailing such order.

Therefore the complaint has shown that the item of \$833.64 was not remitted *after* the 21st, for had it been remitted after that date it could not have reached the Chemical on the 24th. So that in any event it was remitted before the Capital closed. But the complainant has shown that the probabilities are very great, that the money was remitted *some days earlier than the 21st*.

The presumption is that it was sent by mail, like all the others. If it was not, and if there was anything in the manner of its sending that would favor the complainant, he is presumed to know it and has not divulged the facts. The frame of his bill failed

to attract attention to it, and diverted attention from it; and now he wants the money because the exact manner and time of transmission have not been shown by the defendants. He simply asks a decree from it, based upon a guess that it was remitted after suspension. That is shown to have been impossible, and the appellant has failed to prove any title to it.

XI.

In the recent case of *Merrill, Receiver, v. First National Bank of Palatka*, Nos. 54 and 55, October Term, 1898, this Court has held that a secured creditor may prove his whole debt without deducting collaterals; that in settling the affairs of an insolvent national bank the right of set-off exists, and "took effect as of the date of the declaration of insolvency"; that "the creditors' rights in the trust fund are established when the fund is created," and "that which at the time of the insolvency belongs of right to the debtor does not belong to the bank," and that "the claims of creditors are to be determined as of the date of the declaration of insolvency." All these rules support the contention of appellee. There was no definite act of insolvency or act of bankruptcy by the Capital Bank unless the closing of its doors at the close of business hours on the 21st may be called such. The possession of the Examiner on the 22d was a declaration by him that the bank was insolvent on that day. It was a declaration to others when the advice was received. The Chemical Bank received that information on the 23d. If legal rights related back to either the 21st or the 22d, then on either of those days the money sued for did not belong to the bank; it had pre-

viously been remitted to the Chemical Bank, in the usual course of business, and before any "act" or "declaration" of insolvency. The title had vested in the Chemical by the act of mailing the remittances. Treating the question either as one of payment in the usual course, or under the right of set-off, the decree below should be affirmed.

NEW YORK, March, 1899.

GEO. H. YEAMAN,
GEORGE C. KOBBE,
Of Counsel for Appellee.

**McDONALD, Receiver, v. CHEMICAL NATIONAL
BANK.**

**APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT.**

No. 242. Argued April 13, 1899. — Decided May 22, 1899.

The several payments and remittances made to the Chemical Bank by the Capital Bank before its insolvency were not made in contemplation of insolvency, or with a view to prefer the Chemical Bank.

These cheques and remittances were not casual, but were plainly made under a general agreement that remittances were to be made by mail, and that their proceeds were not to be returned to the Capital Bank, but were to be credited to its constantly overdrawn account; and when letters containing them were deposited in the post office, such mailing was a delivery to the Chemical Bank, whose property therein was not destroyed or impaired by the insolvency of the Capital Bank, taking place after the mailing and before the delivery of the letters containing the remittances.

IN January, 1896, Kent K. Hayden, as the duly appointed receiver of the Capital National Bank of Lincoln, Nebraska, filed in the Circuit Court of the United States for the Southern District of New York a bill of complaint against the Chemical National Bank of New York.

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The bill alleged that the Capital National Bank, on the 21st day of January, 1893, was insolvent and stopped doing business, and that on the 22d day of January, 1893, the Comptroller of the Currency closed said bank and took possession of its assets and affairs; that for a period long prior to the 15th day of January, 1893, the said bank was insolvent, and its insolvency was known to all its officers; that ever since the 2d day of June, 1884, there had been mutual and extensive dealings between the two banks above named, in which each had acted for the other, as correspondent banks do, for the making of collections and the crediting of the proceeds thereof; that the Capital National Bank kept an active deposit account with the defendant, and that settlements on the basis of such accounts were made at periodic times during all said period, and any balance after the correction of errors, mutually agreed to be charged or credited, was at such periods credited or debited, as the fact might be, upon the books of each of said banks to a new account, and the prior accounts thereby and in that manner adjusted and settled.

That the defendant bank had refused to pay or honor the drafts drawn upon it by the Capital National Bank presented on or since January 21, 1893; that since January 22, 1893, the defendant bank had received many and large sums of money belonging to and for the account of the Capital National Bank, some of it being the sums of \$2935.60, \$815.79 and \$735, from the officers of the Capital National Bank, and the rest from the third parties which remitted the same to the defendant for account of the Capital National Bank, and that, in particular, it had received on January 23, 1893, five thousand dollars from the Packers' National Bank, and two thousand dollars from the Schuster Hax National Bank, and divers other sums from others, on that day and since; that the defendant had refused to account for and pay over to the complainant the said collections. Wherefore it was prayed that an accounting be had, and that the defendant be ordered to pay over what might be thereby found due.

The defendant bank answered, admitting the preliminary allegations of the bill, but denying its knowledge of the

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insolvency of the Capital National Bank on or prior to January 21, 1893, but averring that up to the 23d day of January, 1893, it was informed and did believe that the said Capital National Bank was entirely solvent, and dealt with it and gave it credit as a solvent bank.

The answer denied that on and after January 21, 1893, it had ceased to pay and refused to pay all drafts drawn upon the defendant by the Capital National Bank, but admitted that on the 23d day of January, 1893, because of information then for the first time received of the struggling condition of said bank, the defendant bank did refuse to pay the drafts of the Capital National Bank, which was then indebted to the defendant in the sum of at least \$13,992.93 on balance of account, besides large amounts of negotiable paper, indorsed by the Capital National Bank, then held by and previously purchased or discounted by the defendant bank, and the proceeds of which had been credited to the account of the Capital National Bank—all of which transactions were averred to have been made in the usual course of business between the banks, and without any knowledge, notice or belief on the part of the defendant bank that the Capital National Bank was insolvent or in any danger of becoming so.

The answer denied that the defendant had, since January 22, 1893, received many and large sums of money belonging to and for account of the Capital National Bank, but admitted that since January 21, 1893, it had received certain remittances and payments in the form of cheques or drafts, for account of the Capital National Bank, all which it had placed to the credit of the Capital National Bank, which had left the Capital National Bank indebted to the defendant bank in a large sum, in the form of balance of account and negotiable paper indorsed to the defendant by the Capital National Bank; and the answer alleged, on information and belief, that said remittances and payments were made by the Capital National Bank, or by other banks and bankers, by the direction and order of said Capital National Bank, through the United States mails, and were so ordered, made and remitted

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before the appointment of any receiver for said Capital National Bank, and before it ceased to pay its obligations or had suspended its usual and ordinary banking business, and that said remittances by said Capital National Bank, or by other banks and bankers, by it ordered to be made to the defendant, were made in the ordinary and accustomed course of business between the defendant and the Capital National Bank, and when received by the defendant were by it placed to the credit of the Capital National Bank.

The answer admitted that it had received the sums of \$2935.60, \$815.79, \$735, \$5000 and \$2000 on the 23d day of January, 1893; that the said sums of \$2935.60 and \$815.79 were remitted to the defendant on or about the 19th day of January, 1893, and the said sum of \$735 on or about the 20th day of January, 1893, by the said Capital National Bank, which, on said respective days, deposited and delivered the same in the United States mail, in letters addressed to the defendant, in the usual and accustomed course of business, and before said Capital National Bank had suspended payment or stopped business, and before it was taken charge of by the receiver; that the said sum of \$5000 was remitted to the defendant on or about the 19th day of January, 1893, by the Packers' National Bank, and the said sum of \$2000 was remitted to this defendant by the Schuster National Bank on or about January 19, 1893, by being by said banks respectively deposited in the United States mail, in letters addressed to the defendant, in the usual course of business, and before the Capital National Bank suspended payment or stopped business, and before it was taken charge of by the receiver. And the answer alleged, on information and belief, that said remittances to it by the Packers' National Bank and the Schuster National Bank respectively were made in virtue of orders and directions previously given to them by said Capital National Bank on or about January 18, 1893, in the usual course of business between them and the Capital National Bank.

A replication was filed and evidence put in on behalf of the respective parties. It was stipulated that the Capital National

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Bank continued to transact the usual and ordinary business of a national bank up to the close of banking hours on January 21, 1893; that the ordinary mail time between Lincoln, Nebraska, and the city of New York is fifty hours; between Lincoln and South Omaha, Nebraska, where the Packers' National Bank is situated, is two hours and forty minutes; between South Omaha and New York City, forty-eight hours and thirty-seven minutes; between Lincoln and St. Joseph, Missouri, where the Schuster Hax National Bank is located, is seven hours and twenty-eight minutes, and between St. Joseph and New York City is fifty hours and fifty-five minutes. The complainant put in evidence an account or statement, furnished by the defendant to the complainant, showing the transactions between the Capital National Bank and the Chemical National Bank from January 3, 1893, to January 27, 1893, showing a balance on the last day of \$13,817.94, against the Capital National Bank and in favor of the Chemical National Bank.

The complainant likewise put in evidence a draft drawn on January 13, 1893, by the Capital National Bank on the Chemical National Bank for \$5000, to the order of T. M. Barlow, cashier; and a protest of said draft for non-payment on January 17, 1893; also a statement of various drafts drawn by the Capital National Bank on the Chemical National Bank, at different times, in favor of third parties, and protested for non-payment on and after January 24, 1893. These protested drafts amounted to \$44,264.66.

The defendant called as a witness its cashier, William I. Quinlan, who testified that when the draft for \$5000 to the order of T. M. Barlow, cashier, was presented and payment refused, the Capital National Bank had no deposits or funds on deposit with the Chemical National Bank out of which such draft could be paid, and that the account of the Capital National Bank had been overdrawn for some time. The defendant put in evidence a letter dated January 19, 1893, from the Packers' National Bank, enclosing its draft for \$5000 on the Fourth National Bank of New York, to be placed to the credit of the Capital National Bank, and letter, dated January

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18, 1893, from the Schuster Hax National Bank, enclosing its draft for \$2000 on the Chemical National Bank, to the credit of the account of the Capital National Bank.

Further evidence was put in by the respective parties, which it does not seem necessary to state.

On March 16, 1897, after argument, upon the pleadings and proofs, the Circuit Court dismissed the bill of complaint with costs. An appeal was taken from this decree to the Circuit Court of Appeals for the Second Circuit, and on January 31, 1898, that court affirmed the decree of the Circuit Court. And from the decree of the Circuit Court of Appeals an appeal was taken and allowed to this court.

Mr. Edward Winslow Paige for appellant.

Mr. George H. Yeaman for appellee. *Mr. George C. Kobbé* was on his brief.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

The Capital National Bank of Lincoln, Nebraska, was organized as a banking association under the laws of the United States in June, 1884, and continued to transact the usual and ordinary business of a national bank up to the close of banking hours on January 21, 1893. On January 22, 1893, a bank examiner took possession, and thereafter, about February 6, 1893, a receiver was duly appointed.

The Chemical National Bank of New York, a banking association organized under the laws of the United States and doing business as such in the city of New York, carried on, for some years, a large business intercourse with the Capital National Bank.

The receiver filed the bill in this case, seeking to make the Chemical National Bank account for certain moneys received by it after the suspension of the Capital National Bank.

The nature of the intercourse between the two banks was thus described in a paragraph of the bill:

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"Ever since the second day of June, 1884, there have been mutual and extensive dealings between the two banking associations above named, in which each was acting for the other, as correspondent banks do, for the making of collections and the crediting of the proceeds thereof and transmitting accounts of the same, including costs of protest and other expenses, and the Capital National Bank also kept an active deposit account with the defendant, and that settlements on the basis of such accounts were made at periodic times during all said period, and any balance, after the correction of errors, mutually agreed to be charged or credited, was at such periods credited or debited, as the fact might be, upon the books of each of said banks to a new account, and the prior accounts thereby and in that manner adjusted and settled."

The complainant's case depends, under the evidence, on an application of the provisions of section 5242 of the Revised Statutes, which is as follows:

"All transfers of the notes, bonds, bills of exchange or other evidences of debt, owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any State, county or municipal court."

It appears in evidence that on January 18, 1893, the account of the Capital National Bank with the defendant bank was overdrawn to the amount of \$84,486.19, and that, by sundry remittances made, the amount overdrawn stood, on January 21, 1893, at the sum of \$25,515.32. It further appears that on January 18, 1893, the Schuster Hax National Bank of St.

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Joseph, Missouri, remitted by mail \$2000 to the defendant for the credit of the Capital National Bank; on January 19 the Packer's National Bank of South Omaha, Nebraska, remitted by mail to the defendant \$5000 for the credit and advice of the Capital National Bank; on January 20 the Capital National Bank remitted to the defendant by mail a package of small items amounting to \$735 and a package amounting to \$2935.60, and on the 21st a similar package amounting to \$833.64. On January 23 the defendant received the remittance of \$2000 of the 18th, and of \$5000, \$815.79 and \$2935.60 of the 19th, and of the remittance of \$735 of the 20th; and on the 24th of January it received the remittance of \$833.64. With these remittances credited the account of the Capital National Bank stood, on January 24, 1893, overdrawn \$13,317.94.

The claim of the complainant is to recover all the sums received by the defendant bank on January 23 and 24 as having been transferred and received contrary to the statute. The bill of complaint contains no allegation of any act of insolvency prior to January 22, 1893, or of any payment made in contemplation of insolvency, or of any payment made with a view to prevent the application of the bank's assets in the manner prescribed in the statute, or of any payment made with a view to the preference of one creditor to another.

It is true that, in the course of the trial, it appeared that, on the 17th day of January, 1893, the Chemical National Bank refused to pay a check for \$5000 drawn on it by the Capital National Bank to the order of T. M. Barlow, and it is contended that such refusal by the Chemical National Bank is to be regarded as an act of insolvency on the part of the Capital National Bank. It is difficult to see any foundation for this contention in the mere fact that the Chemical National Bank refused, on January 17, to make further advances on the credit of the Capital National Bank. Such refusal may have been occasioned by a shortage of money on the part of the bank in New York, and because its funds on that day were needed for other purposes, and was entirely consistent with the absolute solvency of the Nebraska bank.

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Nor can a finding that the payments and remittances made to the Chemical National Bank, on the dates above mentioned were made in contemplation of insolvency and with an intent to prefer that bank, be based on the mere allegation that the Capital National Bank was actually insolvent, and that its insolvency must have been known to its officers. It is matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided.

In the present instance there was not only no allegation of payments made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, but there was no evidence that, up to the closing hours of January 21, 1893, the Capital National Bank had failed to pay any depositor on demand, or had not met at maturity all its obligations. And the evidence fails to disclose any intention or expectation on the part of its officers to presently suspend business. It rather shows that, up to the last, the operations of the bank and its transactions with the Chemical National Bank were conducted in the usual manner. It may be that those of its officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the defendant bank. The Chemical National Bank was no more preferred by these remittances several days before suspension than were the depositors whose checks were paid an hour before the doors were closed. Indeed, it is stipulated that the Capital National Bank continued to transact its usual and ordinary business up to the close of banking hours on January 21, 1893.

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The view of the courts below was that these payments and remittances were not made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, and our examination of the evidence has led us to the same conclusion.

It remains to consider another proposition very strongly pressed on behalf of the appellant, and that is, that the moneys and checks remitted to the defendant bank which did not reach it till after the bank examiner had taken possession could not, in law, become the property of the defendant bank, but remained part of the assets of the insolvent bank, for which the defendant must account to the receiver, in order that the proceeds may be ratably divided among the creditors.

It is said that the taking possession of the bank by the Comptroller of the Currency is a distinct declaration of insolvency, and cases are cited in which it has been said by this court that the business of the bank must stop when insolvency is declared, *White v. Knox*, 111 U. S. 784; and that the state of case, where the claim sought to be offset is acquired after the act of insolvency, cannot sustain such a transfer, because the rights of the parties become fixed as of that time. *Scott v. Armstrong*, 146 U. S. 499.

The law is, doubtless, as thus stated, but does it apply to the present case?

It is conceded in his brief by the learned counsel of the appellant that if the drafts and checks had been deposited in the mail pursuant to any agreement, or even if the defendant had known any thing about them, they might have been regarded as the property of the Chemical National Bank as of the date of mailing. But he urges that this was only the case of a bank sending the checks of other parties to its agents for collection and deposit; that it could have sent them to any other agent had it pleased, and that after it had once put them in the mail it could have taken them out again. And queries are put as to which bank would have suffered the loss if the checks had been destroyed in transit, or if they had proved to be worthless.

But here we have the case, not of a casual remittance, but of remittances sent from time to time, and frequently, during a

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long course of business between the banks concerned. There may have been no special agreement as to each particular remittance, but there was plainly a general agreement that remittances were to be made by mail, and that their proceeds were not to be returned to the Capital National Bank, but were to be credited to its constantly overdrawn account.

Whose the loss might be, if the packages were destroyed *in transitu*, or if the checks proved uncollectible, are not questions that concern us now. It is sufficient, for present purposes, to say that the inference is warranted that it was understood between the parties that these remittances were to be made through the mails, and that they were in the nature of payments on general account.

Nor can it be conceded that, except on some extraordinary occasion and on evidence satisfactory to the post office authorities, a letter once mailed can be withdrawn by the party who mailed it. When letters are placed in a post office they are within the legal custody of the officers of the government, and it is the duty of postmasters to deliver them to the persons to whom they are addressed. *United States v. Pond*, 2 Curtis C. C. 265; *Buell v. Chapin*, 99 Massachusetts, 594; *Morgan v. Richardson*, 13 Allen, 410; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390.

However, it is not pretended in this case that the checks were destroyed or proved worthless, or that the Capital National Bank either withdrew the remittances or countermanded their delivery.

We think that the courts below well held that, under the facts of this case, the mailing of these checks and remittances was a delivery to the Chemical National Bank, whose property therein was not destroyed or impaired by a subsequent act of bankruptcy.

It is finally urged that, however it may be as to the remittances received through the mail on January 23, 1893, yet that the payment or remittance of \$833.64, received on January 24, was a payment made after the declaration of insolvency, and must therefore be accounted for by the defendant bank.

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It is claimed that there was no evidence that this remittance came by mail, and that all there is in the case is the admission by the defendant bank of its receipt of that sum on January 24, 1893.

But it is to be observed that no mention is made in the bill of this particular item, though the other litigated items are specified, and to the latter only was the proof directed. In the absence of evidence as to any other method of transmission, and in view of the fact that all the other payments were made by mail, it would seem to be a reasonable inference that such was the case of this remittance. The record discloses that the cashier of the Chemical National Bank testified in the case. He had furnished the complainant with a statement of the accounts between the banks from January 3, 1893, to January 24, 1893, including this particular item; but he was not cross-examined as to this item. Had he been so examined, a more particular statement in respect to it would have been, no doubt, elicited. It was apparently assumed that the history of this payment did not differ from that of the others; and the effort now made in respect to it seems to be in the nature of an afterthought, too late to permit an explanation.

Upon the whole case, we are of the opinion that the decree of the Court of Appeals was correct, and its decree is accordingly

Affirmed.

MR. JUSTICE WHITE, MR. JUSTICE PECKHAM and MR. JUSTICE McKENNA dissented.